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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER,

Petitioners,

vs.

GULF OIL CORPORATION, a Pennsylvania corporation, THRIFTY OIL CORPORATION, a California corporation

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

KENNETH P. ROBERTS
A PROFESSIONAL LAW CORPORATION
5850 Canoga Avenue, Suite 400
Woodland Hills, CA 91367
(818) 888-3553

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Do State Courts enjoy concurrent jurisdiction to enforce rights created by the Petroleum Marketing Practices Act, 15 United States Code § 2801 – 2806 as supported by the language and decisional history of the statute or, do federal courts hold exclusive jurisdiction over PMPA actions as announced by the district court in *Rustom v. Atlantic Richfield Company,* 618 F. Supp. 210 (C.D. CA 1985) a decision based upon analogizing the jurisdictional language of the Petroleum Marketing Practices Act to the jurisdictional language in Title VII of the Civil Rights Act?

2. May a state court of appeal disregard a remand order and subsequent ruling of the circuit court on appeal, in reversing the trial courts decision for Petitioner, based *only* on its collateral determination that the state court lacked jurisdiction, in contravention of both the opinion of the district court and the prohibition of 28 U.S.C. § 1447(d)?

PARTIES TO THE PROCEEDING BELOW

Petitioners, JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER, and Defendants, GULF OIL CORPORATION, GULF OIL REAL ESTATE DEVELOPMENT CORPORATION, a wholly owned subsidiary of GULF OIL CORPORATION, assorted individual employees of GULF, AND THRIFTY OIL CORPORATION were all parties to the action below.

Although all Petitioners met the definition of 'franchisee', only Respondent Mobil Oil Corporation met the definition of 'franchisor' and accordingly, they are the exclusive parties to the issues presented to this Court. However, the interrelatedness of Petitioner's claims against Thrifty Oil Corporation as well as Gulf, have prompted Petitioners inclusion of Thrifty herein, although admittedly as merely an interested part.

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Petitioner respectfully petitions this Court for issuance of its Writ of Certiorari as follows:

INTRODUCTION

The Federal Petroleum Marketing Practices Act (hereinafter "PMPA"), 15 United States Code § 2801, et seq., was enacted June 19, 1978, to establish "minimum federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of fuel." S.Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 873. Congress was concerned "with the disparity of bargaining power between distributors and retailers of motor fuel. With this remedial purpose in mind, Congress sought to limit the circumstances in which a distributor could terminate a franchise relationship with the retailer." *Bsales v. Texaco, Inc.*, 516 F. Supp. 655, 661 (D. N.J. 1981). As the Seventh Circuit Court of Appeals has concluded:

> ". . . [A]s remedial legislation, the Act must be given a liberal construction consistent with its overriding purpose to protect the franchisees. [citations]" (*Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1220-1221 (1982).)

When analysing whether federal courts have exclusive jurisdiction over a claim brought under a federal law, one begins with the presumption that concurrent state and federal jurisdiction exists. Recently the California Supreme Court followed this presumption in *Cianci v. Superior Court*, 40 Cal.3d 903, 710 P.2d 375 (1985), finding concurrent jurisdiction to exist in actions involving the Federal Racketeer Influenced and Corrupt Practices Act, wherein it stated:

> " 'Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under

federal law has been the exception rather than the rule.' (Citation omitted). Accordingly, '[i]n considering the propriety of state court jurisdiction over any particular federal claim, [we] begin with the *presumption* that state courts enjoy concurrent jurisdiction. (Citations omitted) (emphasis added)." (Id. at page 910).

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, (1981), this Court said:

"The general principal of state court jurisdiction over cases arising under federal law is straight forward: state courts may assume subject-matter jurisdiction over a federal cause of action *absent provision by Congress to the contrary or disabling incapability between the federal claim and state court adjudication.*" (emphasis added) (Id. at pages 477-478).

The Court in *Johnson v. Mobil Oil Corporation*, 364 Pa.Super. 275, 528 A.2d 155, 163-164 (1987) gives perhaps the most thorough analysis of the issue *as applied to the PMPA* and concludes:

". . . We perceive no incompatibility between state court jurisdiction and promoting Congress' intent to protect the needs of both franchisees and franchisors, to remedy disparity in bargaining power and to prevent arbitrary or discriminatory termination or nonrenewal. For the foregoing reasons, we find that a state court enjoys concurrent jurisdiction over claims under the PMPA." (528 A.2d at 164).

The State of California in *Niakan v. Samaan*, 199 Cal.App.3d 716; 245 Cal.Rptr. 24 (1988) has recently taken the opposite position, holding that federal courts have exclusive jurisdiction to enforce the PMPA. There is no federal circuit Court of Appeal opinion on this issue and the federal district courts are divided with the decision upon which *Niakan* rests, *Rustom v. Atlantic Richfield Company*, 618 F.Supp. 210 (C.D. CA 1985) finding exclusive federal court jurisdiction, and *Ted's Tire Service, Inc. v. Chevron U.S.A. Inc.*, 470 F.Supp. 163 (D. Conn. 1979) finding concurrent state court jurisdiction. Every prior court

to consider this issue has determined that concurrent jurisdiction exists; at least seven other states having considered the issue, exercising jurisdiction over the PMPA in reported decisions.

The first issue presented by this Petition is whether state courts enjoy concurrent jurisdiction to enforce rights created by the PMPA.

Title 28 of the United States Code § 1447(d) provides in pertinent part:

> "An order remanding the case to the state court from which it was removed is not reviewable on appeal or otherwise . . . "

As hereafter discussed, in the trial court below, the case at bar was removed not once, but twice by Defendants to federal court. On both occasions, the federal court remanded the action for adjudication of the dealer's PMPA claims in state court and the Ninth Circuit Court of Appeal *dismissed* Defendant's appeal citing this Court's Opinion in *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 343; 96 S.Ct. 584 (1976).

The second issue presented by this Petition is whether a state court of appeals is precluded from entertaining questions concerning the proper jurisdiction for actions brought under a federal statute when a federal court has chosen rightly or wrongly, to remand the case after removal for adjudication of Petitioner's PMPA claims in state court.

OPINIONS BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is printed in Appendix A hereto; the Court of Appeal declining to publish said Opinion. Also appended hereto,

is the Opinion of the United States District Court, Central District of California.

A Petition for Hearing to the California Supreme Court was denied on July 20, 1988, with Justice Mosk dissenting.

JURISDICTION

The jurisdiction of this Court is invoked upon the following grounds:

On May 8, 1988, the Court of Appeal of the State of California, Second Appellate District, Division Two, filed its Opinion in this case reversing Summary Judgment for Petitioner on PMPA grounds, having determined that the federal courts hold exclusive jurisdiction over PMPA causes of action. The applicable portion of the Court of Appeal Opinion is set forth in Appendix A, pages 4 through 5, attached hereto.

On July 20, 1988, the California Supreme Court filed its Order Denying Dealer's Petition for Review in the California Supreme Court, and this Petition has been filed within 90 days of that date.

Jurisdiction for review exists pursuant to United States Supreme Court Rules, Rule 17.1(b) and 17.1(c) by reason of a conflict amongst both state courts and federal courts upon a federal issue, and by reason that the conflict presented relates to an important question of federal law which has not been, but should be, settled by this Court. The exclusive federal jurisdiction holdings of the California Court of Appeals here, and in *Niakan v. Samaan*, 199 Cal.App.3d 716, *supra*, and *Rustom v. Atlantic Richfield Co., supra*, 619 F.Supp. 210 directly conflict with the state and federal court holdings of *Johnson v. Mobil Oil*

(PA. Super.), *supra*, 528 A.2d 155, 163-164, *Ted's Tire Service Inc. v. Chevron U.S.A. Inc.*, *supra*, 470 F.Supp. 163, and the exercise of jurisdiction by at least seven other states.

Because opposite conclusions have been reached in published decisions upon the issue of whether concurrent or exclusive federal jurisdiction exists as to actions created by the PMPA, the validity of proceedings involving the PMPA undertaken in state courts currently and in the future remain open to question until such time as the jurisdictional issue is resolved. Keeping in mind the compelling need for the PMPA and its protective provisions, a need found to exist by Congress, it is submitted that the issue presented herein is an important question of federal law to be settled by this Court. Moreover, this Court has not heretofore considered any issues arising under the PMPA. In the interest of an orderly and proper development of the law in this area of great public importance, an area also already under the eye of federal agencies, resolution of this issue is deserving of this Court's attention and interpretation.

Further, remand orders pursuant to 28 U.S.C. § 1447(d) are not reviewable on appeal or otherwise as has been long established by this Court. Therefore, whether a state court is precluded from revisiting the issue of proper jurisdiction of the causes of action before it presents yet another issue upon which the Decision of the California Court of Appeal below conflicts with previous district court decisions, and additionally, the holding of this court on a federal question. In that this Court has expressly recognized that a remand order is a binding determination of jurisdiction whether or not that order might be deemed erroneous by an appellate court, the decision herein is in direct conflict and requires this Court's review. As set forth infra, application of 28 U.S.C. § 1447(d) to the possibly ambiguous or unforeseen

circumstances herein is deserving of this Court's interpretation and holding.

The validity of remand orders, an important mechanism by which the federal courts exercise control over their jurisdiction, will remain open to review or sidestepping by state courts until this issue is resolved.

STATUTORY PROVISIONS INVOLVED

This case involves two statutory provisions. The Petroleum Marketing Practices Act, 15 United States Code § 2801-2806, the provisions of which are set forth in Appendix G, and the Removal Statute 28 United States Code § 1447(d), the provisions of which are set forth in Appendix H. The jurisdictional language of the PMPA at issue in the present Petition is contained in 15 U.S.C. § 2805(a) as follows:

> "If a franchisor fails to comply with the requirements of § 2802 or 2803 of this Title, the franchisee may maintain a civil action against such franchisor. Such action *may be brought* without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business. Except that no such action may be maintained unless commenced within one year after the later of –
> "(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or
> (2) the date the franchisor fails to comply with the requirements of § 2802 or 2803 of this Title." (Emphasis Added).

The jurisdictional language of Title 28 U.S.C. § 1447(d) at issue in the present Petition is as follows:

"An order remanding a case to the State court from which it was removed is not reviewable on Appeal or otherwise . . . "

STATEMENT OF CASE

A. Facts and Lower Court Proceedings.

In early 1979, having concluded that business was not profitable in Southern California, Gulf announced a plan to sell its Los Angeles division assets. Shortly thereafter, Thrifty advised Gulf of its interest in purchasing Gulf's Southern California service stations and by Contract dated September 30, 1980, Gulf agreed to sell, and Thrifty agreed to purchase, all of Gulf's Los Angeles division service stations. When Gulf and Thrifty entered into the September 30, 1980 Contract, each Dealer occupied and operated a service station owned or leased by Gulf, pursuant to a franchise agreement which included a lease agreement and a gasoline supply agreement with Gulf.

Both Thrifty and Gulf recognized that the terms of their contracts and agreements would trigger the PMPA and therefore expressly agreed, in paragraph 18, subparagraph (c), of their contracts dated September 30, 1980, that each would abide by the provisions of the PMPA.

Consistent with its obligations under the PMPA Gulf identified its dealers to whom a right of first refusal was required to be given and thereafter, by letter dated November 24, 1980, notified its Los Angeles division dealers, stating in part:

"You will be given notification of the offer required by the PMPA to acquire the station yourself."

Thereafter Thrifty protested, disputing that the PMPA gave the dealers a right to first refusal.

In August, 1981, the Petitioners filed this action against Gulf and Thrifty alleging in their First Cause of Action that the dealers were entitled to a declaration of rights that (1) each dealer was a franchisee as defined in

15 U.S.C. § 2801; and (2) before Gulf could sell its interest in the dealer's service station premises to Thrifty, it must make a bona fide offer to sell their interest to the dealers pursuant to the PMPA.

Following the filing of the First Amended Complaint, both Gulf and Thrifty twice unsuccessfully attempted to remove the case to federal Court. Because the Ninth Circuit does not permit pendent party jurisdiction, and because there did not exist a separate and independent controversy as to Thrifty, remand was ordered pursuant to 28 U.S.C. § 1447(c) by the United States District Court for the Central District of California. The District Court Opinion, filed March 13, 1984, is attached as Appendix C. (App. p.8).

Thrifty applied to the United States Court of Appeals, Ninth Circuit, appealing the Decision of Remand and Gulf filed in addition, a Petition for Writ of Mandamus. The Ninth Circuit Court of Appeal dismissed Defendant's Appeal by Order dated July 3, 1984, citing *Thermatron, supra.* The Circuit Court's Minute Order is attached as Appendix D (App. p.24). The Circuit Court also denied the Petition for Writ of Mandamus, by Order dated August 22, 1984, attached as Appendix E (App. p.25).

Thereafter, the dealers moved for summary adjudication of issues on October 5, 1983. By their Motion, dealers sought adjudication that the September 30, 1980 Agreement between Defendants Gulf and Thrifty was an event and occurrence that "triggered" notice and first refusal rights in Gulf's interest, be it fee or leasehold, in the service station properties which the Dealers occupied and operated as franchisees pursuant to the PMPA, 15 U.S.C. § 2801 et seq. After taking the Motions under submission, the Court (Swearinger, J.) ruled that the Contract between

Gulf and Thrifty gave each dealer a right of first refusal, which was required to be offered 45 days prior to the closing date May, 1981. On December 10, 1984, the trial court entered its Minute Order in favor of the dealers holding:

> "The September 30, 1980 Agreement between Defendants was an event and an action that gave to each moving Plaintiff a right to first refusal to purchase Gulf's interest in their respective service stations. B. Under the [PMPA] Defendant Gulf was obligated to offer each moving Plaintiff the right as aforesaid at least 45 days prior to the agreed upon closing date of the Gulf sales of Thrifty (May 1981)."

The Trial Court's Minute Order, filed December 10, 1984, is attached as Appendix F (App. p.26). The Court's Minute Order further stated that the Court found that Counts 1, 6 and 7 of the dealer's Complaint "relate to rights under the PMPA" and further held that "PMPA jurisdiction is not exclusively in the Federal Courts." On September 11, 1985, at Gulf's request, the Trial Court granted severance of the First Cause of Action from the rest of the Complaint. The only issue remaining thereunder, was the purchase price to be paid by each dealer upon the exercise of his right of first refusal. In addition, the trial court awarded the dealers over $200,000 in costs and attorney's fees pursuant to statutory provisions contained in the PMPA. Gulf and Thrifty appealed asserting that the trial court lacked subject matter jurisdiction over PMPA causes of action, and all of the proceedings in the action were stayed pending resolution of the Appeal. The Court of Appeal reversed, holding that the PMPA is enforceable only in the federal courts and thus the trial court had erred in deciding the PMPA issues. The Court of Appeal Opinion filed May 8, 1988, is attached as Appendix A. (App. p.1).

On July 20, 1988, the California Supreme Court filed its Summary Order denying review of the Court of Appeal Decision. A copy of the Order of the California Supreme Court Denying Review is attached as Appendix B (App. p.7). Both in arguing the case in the Court of Appeal and in the Petition for Review in the California Supreme Court, the PMPA jurisdictional issue and the nonreviewability of Remand Orders pursuant to Title 28 U.S.C. § 1447(d) issues were raised.

B. Gulf's Assertion of the Exclusive Federal Jurisdiction Issue.

Following the filing of the dealer's Complaint Gulf and Thrifty sought removal on the basis that the dealer's claims under the PMPA created a federal question. Following the remand order and the dealer's Motion for Summary Adjudication of Issues in October 1983, Gulf and Thrifty again sought removal on the grounds that the PMPA was a federal statute, but the district court (Hatter, J.) held that the court had no jurisdiction over Thrifty because Thrifty was not a franchisor under the PMPA and there was no separate and independent controversy as between Gulf and Thrifty. (602 F.Supp. 874, 881-882 (1984) (App. C, p.16). Gulf thereafter petitioned the Ninth Circuit for a Writ of Mandate and Thrifty appealed from the district court's remand order. Both the Writ and Petition were denied (App. D, E) Gulf and Thrifty did not directly challenge the jurisdiction of the state court to hear the PMPA violation claims until June of 1987 when they sought relief in the California Court of Appeal, Second Appellate District, Division Two, from the Superior Court Order of December 10, 1984 in favor of the dealers under the PMPA.

Until *Rustom* was decided, there was a uniform body of state and federal law pronouncing the concurrent state court and federal court jurisdiction for claims brought under the PMPA. The only federal court decision addressing the issue held in favor of concurrent state

court jurisdiction. That case, *Ted's Tire*, 470 F. Supp. 163, *supra*, one of the first cases decided under the PMPA following its enactment in 1978, announced that service station dealers could enforce their rights thereunder in either a state or federal Court:

> "[PMPA] stipulates that a civil action to redress a violation of the statute 'may be brought' in a federal district court; it does not state that such an action *must* be instituted in federal court. 15 U.S.C. § 2805. It has long been established, that absent any indication that the federal courts have exclusive jurisdiction over a particular subject, federal laws may be enforced in either the state of federal courts.
>
> * * *
>
> [T]here is nothing in the PMPA which suggests that the Connneticut Superior Court would not have had jurisdiction over a complaint brought under the PMPA." (*Ted's Tire, supra*, p. 2 at 165).

The California Courts agreed: *Cianci, supra*, ("[I]n the PMPA (15 U.S.C. § 2801, et seq.), for example, Congress created a private right of action without limiting jurisdiction to Federal Courts"); and the California Court of Appeal followed suit:

> "[W]e are cognizant that the state courts have concurrent jurisdiction to enforce the PMPA." (*California ARCO Distributors, Inc. v. Atlantic Richfield Corp*, 158 Cal.App.3d 349, 364 (1984).

Based upon *Cianci, supra*, and *California ARCO Distributors, Inc., supra*, it has been established law in California at all relevant times that state courts have concurrent jurisdiction over the PMPA actions.

After seven years of litigation, two remand orders and an appeal to the Ninth Circuit Court of Appeals, throughout which it was uniformly held that this dispute was properly within the Superior Court, judgment for the dealers was reversed, *solely* upon the basis of jurisdiction. In June, of 1987, almost six years after petitioners brought this lawsuit, and almost two years after the opinion was

filed in *Rustom*, the first reported case to accept a contention that federal courts held exclusive jurisdiction to consider claims under the PMPA, Gulf and Thrifty raised this jurisdictional issue. The Court of Appeal reversed the trial court, asserting that the California Superior Court lacked subject matter jurisdiction over the PMPA issues citing the recent California Court of Appeal decision, *Niakan, supra*, a decision based solely upon *Rustom* without further consideration or analysis of the issue (Appendix A, p.4).

In contrast, the Appellate Court for the State of Pennsylvania after much consideration and original analysis of the issue, rejected the *Rustom* decision and its logic, instead following *Ted's Tire* in its *Johnson* opinion. In the ten years since the PMPA was enacted, *Rustom*, and recently *Niakan*, are the only published decisions to hold that federal courts have exclusive jurisdiction over PMPA claims. Every other published opinion analysing issues under the PMPA has found or assumed concurrent jurisdiction, including *Lanham v. Amoco Oil Co.*, 481 F.Supp. 405 (D.Md. 1979) [remanding litigation to the State Court forum for trial on the merits]; *Johnson v. Mobil Oil Co., supra*, [rejecting *Rustom*,]; *Frankard v. Amoco Oil Co*, 116 Wis. 2d 254, 342 N.W.2d 247 (1983); *Walters v. Chevron U.S.A., Inc.*, 154 G.App., 636, 269 S.E.2d 495 (1980); *Bates v. Chevron U.S.A., Inc.*, 151 G.App. 544, 260 S.E.2d 367 (1979); *Ricco v. Shell Oil Co.*, 180 N.J.S. 399, 434 A.2d 1151 (1981); and *DeCosta's Automotive, Inc., v. Birchwood Plaza Shell, Inc.*, 482 N.Y.S. 2d 832 (1984).

C. The Court of Appeals Reversal Based Only Upon the Issue of Jurisdiction in Contravention of Title 28, United States Code § 1447(d).

Although the District Court had remanded this case twice and the Ninth Circuit Court of Appeal had dismissed Defendant's Appeal of Remand, and in addition

Defendant's Petition for Writ of Mandamus, the California Court of Appeal reversed judgment for the dealers on jurisdictional grounds.

> Title 28 of the United States Code § 1447(d) provides: "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. . . ."

The effect of Title 28 United States Code § 1447(d) was plainly stated in the often cited case of *Chandler v. O'Brien*, 445 F.2d 1045 (10th Circuit 1971), cert. denied, 405 U.S. 964, as follows:

> "Thus so far as the question of a forum in which a case is to be litigated is concerned, the determination of a federal district court that a case is not removable and remanding it to the state court is final."

The present action was removed not once, but on two separate occasions to the United States district court. On both occasions, the action was remanded because after careful review of the issue, the United States district court determined that there did not exist a separate and independent controversy as to Thrifty and accordingly, the proper forum for the dispute was in the state court. The second remand order was directly appealed to the Ninth Circuit Court of Appeal. That Appeal was dismissed, the Ninth Circuit Court of Appeal citing *Thermatron, supra,* wherein, this Court stated as follows:

> "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues (citation omitted) *Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c),* whether or not that order might be deemed erroneous by an Appellate Court." (Emphasis Added) *Thermatron, supra,* p.3 at 351.

Notwithstanding the remand orders, over seven years after this case was first filed, the issue of jurisdiction continues to be litigated.

Uniformly, published decisions of both the district and circuit courts in agreement with this Court have held that remand orders are immunized from all forms of appellate review, whether or not the court of appeal below considers the remand order erroneous as to the forum in which the dispute should be litigated.

A recent Ninth Circuit Court Opinion has reaffirmed this entire line of cases. In *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291 (9th Cir. 1987), the Ninth Circuit Court of Appeal stated:

> "Remand orders issued pursuant to 28 U.S.C. § 1447(c) and based on the grounds specified therein, ie., that removal was improvident and without jurisdiction, are immune from appellate review. (citations omitted). In such cases, 28 U.S.C. § 1447(d) acts as an *absolute* bar to review by appeal or mandamus. (citation omitted). This prohibition applies even if the district court's jurisdictional decision was erroneous." (Emphasis Added) Id. at 1293.

There are no published opinions wherein a state court of appeal is permitted to review and reverse the jurisdictional determination of the district court, and, in fact, all decisions on the issue hold that such an order is "immune" from review even if the appellate court believed the order to be in error.

REASONS FOR GRANTING THE WRIT

I. Congress Intended that both the State and Federal Courts have Jurisdiction over PMPA Claims.

The issue presented, whether state courts have jurisdiction to consider claims arising under the PMPA, 15 U.S.C. § 2801 et. seq. is one of great public importance in that the PMPA affects the nations second largest industry, the petroleum industry *and* provides the tens of thousands of retail gasoline station franchisees such as Petitioners whose very livelihood is held in the balance by the provisions of the PMPA, some measure of protection

from the abusive and arbitrary conduct to which the industry has subjected franchisees. The PMPA was enacted by Congress in 1978 to protect petroleum franchisees from unfair conduct on the part of the franchisor, and to eliminate the disparity of bargaining power between the two.

Various published decisions have commented on the remedial nature of the PMPA and Congress' intent to provide broad protection to service station franchisees against unfair termination or non-renewal by oil companies. As the Eighth Circuit noted in *Roberts v. Amoco Oil Company*, 740 F.2d 602, 604 (8th Cir. 1984):

> " 'In the nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices.
>
> * * *
>
> It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising.' "

The Senate Report reads as follows:

> "It is also important to note that often the reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one. This expectation by the franchisee, in particular, is often the result of and fostered by, statements and actions of the franchisor. As a result, non-renewal of a motor fuel franchise relationship at the expiration of its term can be almost as punitive as termination of the franchise during its term. The reasonable expectations of the franchisee, rather than any definitive contract rights, are destroyed.
>
> * * *
>
> An essential requirement of the federal legislation is that the grounds for termination and non-renewal provided by the legislation not be so broad as to deny franchisees meaningful protection from arbitrary or discriminatory termination and non-

renewals or prevent fulfillment of the reasonable renewal expectations of franchisees." (S. Rep. No. 731, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 873, 874)

An announcement from this Court is necessary, at this time, to provide effective guidance to the tens of thousands of retail gasoline station franchisees and their legal counsel who currently or in the future must deal with claims under the PMPA. Pending this Court's interpretation and settlement of the jurisdictional issue, actions brought by dealers under the provisions of the PMPA both currently and in the future, face uncertainty. Many states, such as Pennsylvania may continue to rely on the language of *Ted's Tire, supra,* and *California ARCO Distributors, Inc., supra,* and file claims under the PMPA in state court and expend considerable financial resources and invest years of their lives seeking to establish their rights under the PMPA only to face reversal and dismissal of their actions based *only* on the issue of jurisdiction. Other courts, such as California, may follow *Rustom, supra,* and its progeny, *Niakan, supra,* leaving dealers with no forum in which to enforce rights granted them under the PMPA in conjunction with state law claims because district courts, such as the Ninth Circuit, do not exercise pendent party jurisdiction.

It would seem contrary to the remedial nature of this legislation to find that federal courts have exclusive jurisdiction thus forcing gasoline station dealers, a great portion of whom are located in extremely rural areas, to hire expensive big city attorneys in distant cities with little or no comprehension of the franchisee's business or the context in which his problems arise, to represent the dealer in federal district court regarding violations of the PMPA. In states such as California, the result adds insult to injury: the dealer seeking relief under both his state causes of action and the PMPA must therefore fight his battles in both the state and federal courts.

Furthermore, should state courts be found lacking in jurisdiction to hear claims arising under the PMPA, district courts will be burdened by a great deal more PMPA cases than perhaps presently contemplated. A major component of most petroleum franchise relationships, in addition to the gasoline supply and trademark agreements is a premises lease agreement. Unlawful detainer actions in connection therewith, are actions frequently brought by franchisors in terminating a franchise, and although currently brought in state courts, will of necessity be removed to federal district court. The dealer wishing to assert PMPA defenses to an unlawful detainer action by the franchisor would be required to raise those questions in the district court. Thus, the impact of exclusive federal jurisdiction would not be limited to dealers in that it will significantly and, it is contended, needlessly increase the work load of district courts.

The proponents of exclusive federal court jurisdiction over matters arising under PMPA take their cue from a single federal court opinion, that of *Rustom, supra,* in which the district court considered the jurisdictional issue in light of *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984). As heretofore noted the appellate court's decision below following *Rustom,* is inconsistent with the express language of the statute, all other published federal and state case precedence, and the pronouncements of both this Court and the California Court of Appeal.

The court in *Valenzuela,* dealing with a similarily vague and ambiguous piece of legislation, Title VII of the Civil Rights Act held that in the absence of an explicit statutory directive, exclusive federal jurisdiction may be implied from the legislative history of the federal act. Exclusive jurisdiction over Title VII of the Civil Rights Act was determined to exist based on implications drawn from the statutory references to federal procedure rules

and from an absence in the legislative history of any reference to potential state court jurisdiction. (*Valenzuela, supra,* 739 F.2d at 436.)

The district court in *Rustom,* analogizing the jurisdictional language in the PMPA to that of Title VII of the Civil Rights Act, concluded that the same factors were present in the PMPA, in the same degree. (*Rustom, supra,* p. 3 at 212-213). However, a careful analysis of the *Rustom* courts reasoning reveals that it is erroneous because it rests primarily upon the improper application of guidelines announced in *Valenzuela* to the factors present or more accurately, absent from the PMPA.

In *Valenzuela,* the Ninth Circuit reasoned that federal courts have exclusive jurisdiction over Title VII for two reasons. First, the legislative history of Title VII refers to enforcement in federal courts but does not refer to enforcement in state courts. Second, Title VII contains references to procedural mechanisms available only in the federal court system. Similarly, according to *Rustom,* the legislative history of the PMPA refers only to enforcement of actions brought in federal court and the PMPA incorporates substantive standards found in the Federal Rules of Civil Procedure. A closer examination of the PMPA reveals that the court's reasoning in *Valenzuela,* does not apply to the PMPA.

In fact, a much better analogy could be made to the jurisdictional language of any number of other federal acts, including the Federal Racketeer Influenced and Corrupt Practices Act or the Labor Management Relations Act of 1947. The California Supreme Court in its Decision in *Cianci, supra,* reasoned that concurrent jurisdiction exists in actions involving the Federal Racketeer Influenced and Corrupt Practices Act citing and relying upon *California ARCO Distributors, Inc.,* and *Ted's Tire,* as examples of actions involving statutes, (in each instance the

PMPA), wherein concurrent jurisdiction existed. The California Supreme Court in *Cianci, supra,* said:

> " 'Congress, . . . may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction *can be rebutted by an explicit statutory directive, by unmistakeable implication from legislative history, or by clear incompatibility between the state court jurisdiction and federal interest.*' (citation omitted). Put otherwise *'the presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption.'* " (Citation omitted) (emphasis added) (Id. at page 910).

The Court in *Valenzuela,* began its analysis by noting that while Title VII made affirmative references to actions being brought in federal court without mentioning actions brought in state court, that fact was not determinative of jurisdiction. (739 F.2d at 436).

> "It is black-letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust the state court from concurrent jurisdiction over the cause of action." (*Gulf OffShore Corp. v. Mobil Oil Corp.*, 453 U.S. 473, 479, 101 S.Ct. 2870, 2875-2876, 69 L.Ed.2d 784 (1981).

Thus, the PMPA's enforcement provision at 2805: "such action may be brought without regard to the amount in controversy, in the district court . . . ", cannot provide the explicit statutory directive of exclusive jurisdiction necessary to rebutt the presumption of concurrent jurisdiction. (Id. at 478, 101 S.Ct. at 2875).

Additionally, an examination of the PMPA reveals that there *is no* statutory directive providing for exclusive federal jurisdiction. Indeed, the statute is expressly contrary to any conclusion that exclusive jurisdiction exists thereunder.

Pursuant to 15 U.S.C. § 2806, governing the relationship between the statutory provisions of the PMPA, and State and local laws, Congress expressly authorized and

empowered State legislatures to enact statutes which would be "the same as" the PMPA, as they might relate to termination and non-renewal of franchise agreements. Specifically, 15 U.S.C. § 2806(a) provides, in part:

> "To the extent that any provision of this sub-chapter applies to the termination . . . of any franchise, or to the non-renewal of any franchise relationship, no state . . . may adopt, enforce or continue in effect . . . any law or regulation . . . unless such provision of such law relationship is *the same as*, the applicable provisions of this chapter."

Congress has expressly empowered states to enact statutes the "same as" the PMPA and therefor authorized petroleum termination dispute litigation in state tribunals. Clearly congress intended that there exist a uniform body of statutory law, but not that disputes be litigated exclusively in federal court whether litigation be filed under the PMPA or parallel state statutes. To conclude, that the PMPA vests exclusive jurisdiction in federal courts results in the absurd situation that state and federal courts have concurrent jurisdiction in substance but not in form. In other words, state courts can act under laws that are the "same as" the PMPA and must apply federal standards, but can only do so under state legislation. Such a conclusion would frustrate the remedial purposes of the PMPA and is not supported by the plain language of the PMPA.

To the contrary, the enforcement provisions of 15 U.S.C. § 2805 et. seq., provide that a PMPA claim "may be brought" in federal court. Use of the discretionary term "may" is a clear legislative proclaimation that concurrent jurisdiction shall exist. In *Dowd Box Co. v. Courtney*, 368 U.S. 502; 82 S.Ct. 519 (1962) the Supreme Court was asked to decide whether the Labor Management Relations Act of 1947 granted exclusive jurisdiction to federal courts.

Section 301(a) of the Act provided that actions for violations of the law "*may* be brought in any district court in the United States. . . .without respect to the amount in controversy." The court, upon examination of the statute stated that this language "simply gives the federal district court jurisdiction over suits for violation of certain unspecified types of contracts" and that "it does not state or even suggest that federal jurisidiction shall be exclusive." It provides suits of the kind described "may" be brought in the federal district courts, not that they must be." (Id. at 506).

The Court in *Valenzuela*, however relied on "the absence of reference [in the legislative history] to the state courts combined with Congress' affirmative references to the federal courts . . . " (*Valenzuela, supra*, p. 19 at 436.) Similarly, the *Rustom* Court analogized that the legislative history of the PMPA "refer[s] only to the maintenance of an action under the PMPA in federal court . . . " (*Rustom, supra*, at 618 F.Supp. at 212).

However, the legislative history is in fact silent in connection with any stated need for exclusive federal jurisdiction over actions filed pursuant to the PMPA. A close look at the legislative history of this Act reveals that there are only passing references to enforcement in federal courts of PMPA claims and in fact demonstrates there exists neither "an unmistakable implication from legislative history" nor a "clear incompatibility between state court jurisdiction and federal interests" in favor of exclusive federal jurisdiction.

While the senates report of the PMPA mentions, in its summary of major provisions, that the "provisions of Title 15 are enforceable by private civil actions in the U.S. District Court." At no time does the legislative history provide that such action "*shall*" or "*must*" be brought in the U.S. District Court. Indeed, in the more detailed section by section analysis of the PMPA, the senate report

merely refers to such actions being brought in "the courts" whether for equitable relief or monetary damages.

> "*The courts* are authorized to grant equitable relief necessary to remedy the effects of any violation of the requirements of the legislation. *The courts* are instructed to grant preliminary and injunctive relief . . . *the court* is barred from issuing permanent injunctive relief if . . . " (Emphasis Added). [S. Rep. No. 731, 95th Cong. 2d Sess. 40, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 873, 879].

Conspicuously absent from this detailed, section by section review, is any reference to federal or U.S. District Courts. Instead, the generic, all encompassing term "the courts" is used.

The second prong of the *Valenzuela* reasoning relied on statutory provisions in Title VII of the Civil Rights Act which required the Courts to apply *federal* procedural rules relating to such matters as requests for injunctive relief. It is doubtful whether Congress has the constitutional power to require *state courts* to follow such rules. (*Valenzuela, supra,* p. 19 at 436.)

For example, Title VII of the Civil Rights Act requires preliminary injunctions to be issued "in accordance with Rule 65 of the Federal Rules of Civil Procedure." (739 F.2d at 435-36). Furthermore, Courts are required to hear Title VII cases "at the earliest practicable date and to cause such cases to be in every way expedited." (Id. at 436). Because the Valenzuela court did not believe Congress would attempt "to regulate the procedures and priorities of the State Courts" it concluded that Title VII contained an unmistakeable implication to vest federal courts with exclusive jurisdiction.

Unlike Title VII, however, the PMPA does not attempt to regulate court procedure. While the PMPA provides that a franchisee who prevails on an action

thereunder is entitled to actual damages "consistent with the Federal Rules of Civil Procedure . . . " (15 U.S.C. § 2805(d)(1), it is unclear what that reference to the federal rules means. *Rustom* gives no indication of the meaning and there is no reported decision which construes the provision. By implication, the conclusion would be that damages are to be awarded consistent with the Federal Rules of Civil Procedure, which state court tribunals are clearly authorized and capable of doing.

Rustom also relies upon the fact that the PMPA adopts the second circuit standard for granting preliminary injunctions. But adopting the standard does not incorporate Rule 65 into the PMPA. In fact, the standard incorporated into the PMPA departs from the standard followed by federal courts generally and the Ninth Circuit in particular. (See: *Moody v. Amoco Oil Company*, 734 F.2d 1200, 1216 (7th Circuit, 1984).

The PMPA standards for injunctive relief depart from the general equity relief standard in that the "equity standard requires a balance of hardship 'decidedly' in favor of the party seeking the injunction, while the standard in the act only requires that, on balance, the franchisee suffer comparitively more hardship than the franchisor." (*Guilderhus v. Amoco Oil Co.*, 470 F. Supp. 1302, 1304 (D. Mn. 1979).

Contrary to the assertion in *Rustom*, the Ninth Circuit in particular, does not apply the PMPA standard for injunctive relief. In the Ninth Circuit, a preliminary injunction requires the showing of either (1) a combination of probable success on the merits and probability of irreparable injury or (2) serious questions are raised and the balance of hardship tips sharply in its favor. (See: *Los Angeles Memorial Colliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)).

While Congress may not have power to require state courts to follow the procedural rules of Title VII, it does have the power to compel state courts to follow substantive law based upon federal standards as contained in the PMPA. (See: *Emerson v. J.F. Shay Co.*, 76 Cal.App.3d 579, 589 (1978)).

Clearly, Congress had and did exercise the power to require state courts to grant preliminary injunctions based upon a federal standard and to award actual damages consistent with Federal Rules of Civil Procedure. Those are not procedural rules, but are provided merely as guidelines for trial courts to follow and cannot give rise to state and federal court jurisdictional incompatibility such as that created by the language of the Civil Rights Act, in *Valenzuela*.

The *Rustom* courts analogy between the jurisdictional language of the PMPA and that of Title VII upon closer examination is not only lacking in factual underpining, but is illogical. While Congress might justifiably have been concerned that the protections intended when enacting the Civil Rights Act would *not* be enforced at the state court level, that is, by the very states whose long history of discrimination made necessary the legislation; when Congress enacted the PMPA, it acted merely to protect franchisees and end the disparity of bargaining power between the franchisor and the franchisee. Congress also intended to establish a uniformity of franchise termination rules as evidenced by the limited preemption language of PMPA, 15 U.S.C. § 2806(a). To conclude otherwise, that state courts can hear and determine disputes arising out of terminations of petroleum franchises by applying state law and federal authority, but not under the PMPA pursuant to concurrent jurisdiction, makes a judicial mockery out of clear legislative scheme. That is, to insure only a uniform body of rules or laws

governing franchise termination, and not a requirement that disputes be litigated only in federal courts. This Court, should find as the Court in *Johnson* did:

> "We perceive no incompatibility between state court jurisdiction in promoting Congress' intent to protect the needs of both franchisees and franchisors, to remedy disparity and bargaining power and to prevent arbitrary or discriminitory termination or nonrenewal. For the foregoing reasons, we find that a state court enjoys concurrent jurisdiction over claims brought under the PMPA." (citations omitted). (528 A.2d 164)

II. Remand Orders are binding decisions on the Courts of California as to the forum in which the action is to be litigated.

The appellate decision herein, reversing the trial court judgment in favor of Plaintiffs on purely jurisdictional grounds, substitutes the appellate courts opinion as to the proper jurisdictional forum. Therefore, this Court's guidance is requested to ascertain the correct application of 28 U.S.C. § 1447(d) to this possibly ambiguous and unforeseen circumstance. The district court herein, not once, but twice, denied possession of the matter and the Ninth Circuit Court of Appeal subsequently dismissed an appeal citing 28 U.S.C. § 1447(d). The petitioners thereafter, succeeded on the merits in the state court, *only* to be met by reversal in the Court of Appeal, based only on its determination that the United States district court was the proper forum. Although it did so without directly reversing, vacating or modifying that decision, Petitioners herein contend that nevertheless this constitutes a prohibited review by an appellate court of a remand order.

Judge Hatter's Order of Remand based upon "the undisputed material facts and underlying law" (Memorandum Opinion, App. D, p.15) is binding under the principals of 28 U.S.C. § 1447(d), and is not subject to review by appeal or otherwise, either directly or indirectly:

> "The decision of the district court that the case does not envoke the federal jurisdiction and must be remanded *precludes further litigation of the issue of the forum in which the removed case is to be litigated.* (Citation omitted) (*Rath Packing Co. v. Becker*, 530 F.2d 1295, at 1303 (9th Cir. 1975).)

Explaining the logic behind this rule of law, the Court in the frequently cited case of *Missouri Pacific Railroad Company v. Fitzgerald*, 160 U.S. 556, 583, 16 S.Ct. 389 (1896) stated:

> "So far as the mere question of the forum was concerned, Congress was manifestly of opinion that determination of the circuit court that jurisdiction could not be maintained should be final, *since it would be an uncalled for hardship to subject the party who, not having sought the jurisdiction of the circuit court, succeeded on the merits in the state court, to the risk of the reversal of his judgment,* not because of error supervening on the trial, but because of a disputed question of diverse citizenship had been erroneously decided by the circuit court . . . "
> (*Missouri, supra,* at 583)

That the proceedings in state court following a remand order are binding upon state courts of appeal and the highest court of the state, was further spelled out in *Missouri* as follows:

> "A state court cannot be held to have decided against a federal right when it is the circuit court, and not the state court, which has denied its possession . . . as under the statute a remanding order of the circuit court is not reviewable by this Court on Appeal or writ of error from or to that Court, *so it would seem to follow that it cannot be reviewed on writ of error to a state*

> *court,* the prohibition being that *'no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed . . . "* (*Missouri, supra,* at 583).

The very fact that the district court specifically assumed jurisdiction of this matter for purposes of making conclusory findings on material issues related directly to the court's jurisdiction, demands a conclusion that concurrent jurisdiction over PMPA claims exist, and that in fact, the District Court for the Central District of California has found concurrent jurisdiction exists as to Petitioner's claims. The Court of Appeals determination to the contrary, that jurisdiction lies exclusively in the federal courts, is therefor at odds both with the prohibition of § 1447(d) and with the specific determination by the district court of the jurisdictional issue raised by Gulf. The District Court's assumption of jurisdiction *could only occur upon the basis that it found concurrent jurisdiction to exist because "if it is determined that the removed case is one over which the federal courts have exclusive jurisdiction, the federal court cannot hear the action."* (Federal Practice and Procedures, Wright, Miller, Cooper, § 3722 at p. 284). As held by this Court in *Lambert Run Coal Company v. Baltimore and Ohio Railroad Company,* 258 U.S. 377; 42 S.Ct. 349 (1922) the federal district court *must dismiss* a case that is within its exclusive jurisdiction because when the state court from which the case is removed did not have jurisdiction over the claims the federal court *cannot acquire any derivative jurisdiction,* and therefore:

> "The circuit court of appeals, in remanding the cause to the district court, *should have directed a dismissal for want of jurisdiction . . . "* (Id. at page 383).

The determination of the court of appeal reversing judgment for Petitioners on jurisdictional grounds, constituted a prohibited review of the order of remand. If the Ninth Circuit Court of Appeal would not permit direct review of the remand order and the determination that

jurisdiction was properly in the state court, clearly a collateral review by the California Court of Appeal must be prohibited also. Where this Court has prohibited itself from review of a state court proceeding following remand, including that of the highest court of the state, it would seem to follow that a state court of appeal is prohibited also. As annunciated in *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984):

> "The United States Supreme Court has held that an order of a district court remanding a cause to the state court is not reviewable by the Supreme Court on appeal from a final judgment in the highest Court of this state. (citations omitted).
> 'Even on review in the Supreme Court of a *state court proceeding following remand the propriety of the remand, in a non-civil rights case, cannot be questioned.*" (*Browning v. Navarro, supra*, at 1177).

The Court of Appeals reversal of Judgment for Petitioners on jurisdictional grounds although done without directly questioning the propriety of the remand, constitutes its determination collaterally that jurisdiction was properly in the federal court, a decision petitioners contend *was* a form of a prohibited appellate review of the remand order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant its Writ of Certiorari to review the Decision of the California Court of Appeal in this case. Intervention by this Court is necessary at this time to resolve the conflict of decisions between both the courts of appeal and the district courts and more importantly by reason that the conflict presented relates to an important question of federal law which has not been,

but should be settled by this Court: that is, the proper forum for actions proceeding under the PMPA.

Moreover, it is respectfully requested that this Court clarify that its many decisions pursuant to 28 U.S.C. § 1447(d) prohibiting review of a remand order are applicable at the state court level, and thus orders of remand are binding decisions upon the issue of jurisdiction.

It is respectfully submitted that the proper development of law in this area of great public importance requires the issue of jurisdiction under the PMPA to be answered at this time, and further, that a state court directly or indirectly substituting its opinion as to the proper forum of an action where that issue has previously been decided by a federal court erodes proper federal control of its jurisdiction pursuant to 1447(d) thus requiring this courts intervention.

KENNETH P. ROBERTS
A PROFESSIONAL LAW CORPORATION

By: /s/ Kenneth P. Roberts
Kenneth P. Roberts

Dated: October 17, 1988

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, BEN CESON, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE, AND STEPHEN WEBBER, *Plaintiffs and Respondents,* *v.* GULF OIL CORPORATION, a Pennsylvania corporation; THRIFTY OIL CO., a California corporation, *Defendants and Appellants.*	B 016989 (Super. Ct. No. C 377024 Cons. with case Nos. C 399330, 406851, 406852, 406854, 406855, 406856, 406857, 406858, 407545, 409749, 410941 and 410942.)
BRAD MAY and ARAM SHISHMANIAN, *Plaintiffs-Cross-Appellants,* *v.* GULF OIL CORPORATION, a Pennsylvania corporation; THRIFTY OIL CO., a California corporation, *Defendants-Cross-Respondents.*	

Court of Appeals
Second District
Filed
May 8 - 1988
Robert M. Wilson
Clerk

In this protracted dispute among two oil companies and twelve gasoline station operators, the trial court ruled in favor of the gas station dealers under the federal Petroleum Marketing Practices Act, 15 U.S.C. section 2801 et seq. (hereafter "PMPA"). We reverse

The essential facts are undisputed. Prior to 1978 Gulf Oil Corporation leased some 300 gas stations in its Los Angeles Division to dealers, and by separate contracts supplied them with gasoline. In July 1978, having concluded that business was not profitable in Southern California, Gulf determined to sell its Los Angeles Division assets. In 1980 Thrifty Oil Company offered to buy all of Gulf's Los Angeles Division service stations. A letter contract dated September 30, 1980, sealed the transaction.

Paragraph 18, subparagraph (c) of the contract stated that Gulf and Thrifty agreed to abide by the provisions of the PMPA, insofar as they were applicable. Thrifty and Gulf swiftly fell into contention concerning what was due to the dealers under the PMPA.

Gulf sent copies of a letter dated November 24, 1980, to all of its Los Angeles Division dealers, stating in part: "[Y]ou will be given notification and the offer required by the Petroleum Marketing Practice Act to acquire the station yourself." Thrifty protested, disputing that the PMPA gave the dealers a right of first refusal. Consequently, Gulf asked Thrifty to delay the close of escrow in order to sort out the various parties' rights and obligations.

In August 1981, the dealers filed this action against Thrifty and Gulf in superior court, alleging in their first cause of action that the proposed sale was a conspiracy to

deny them their right of first refusal under the PMPA, and seeking a declaration of rights. Gulf cross-complained for declaratory relief. Thrifty sued Gulf for breach of the purchase agreement; the court granted Gulf's petition to compel arbitration of Thrifty's cross-complaint.

After Gulf and Thrifty twice unsuccessfully attempted to remove the case to federal court (*Abadjian* v. *Gulf Oil Corp.* (C.D. Cal. 1984) 602 F.Supp. 874, 877), the dealers filed for summary adjudication of issues on August 20, 1984. On December 10, 1984, the trial court ruled in favor of the dealers: "The September 30, 1980 agreement between Defendants was an event and an action that gave to each moving Plaintiff a right of first refusal to purchase Gulf's interest in their respective service stations. [§ Under the [PMPA] Defendant Gulf was obligated to offer each moving plaintiff the right as aforesaid at least 45 days prior to the agreed upon closing date of the Gulf sale to Thrifty (May 1981)."

On September 11, 1985, the trial court granted Gulf's request to sever the first cause of action from the rest of the complaint. The only remaining issue on that cause of action was the price to be offered to each dealer for his gas station. The parties stipulated to the facts from which the court determined the purchase prices. Thrifty and Gulf appealed from the resulting judgment. Thrifty also appealed from the order compelling arbitration.

Two dealers, Brad May and Aram Shishmanian, cross-appealed. May complained that he was entitled to purchase all, rather than just a portion of the property Gulf transferred to Thrifty. Shishmanian objected to being

required to pay for improvements Gulf made to his station after the action was filed, but before judgment.

In addition, the court awarded the dealers over $200,000 in costs and attorney fees. Gulf appealed from this award. All appeals were consolidated. All other proceedings in the action were stayed pending resolution of this appeal.

Thrifty and Gulf assert that the California superior court lacked subject matter jurisdiction over the PMPA issues, because Congress intended the federal courts to have exclusive jurisdiction under the PMPA. They are correct. (*Niakan* v. *Samaan* (1988) 199 Cal.App.3d 716.) Since the PMPA is enforceable only in the federal courts, the trial court erred in deciding the PMPA issues. This determination disposes of most of the issues on appeal, as well as the cross-appeals of May and Shishmanian. The dealers will have to be satisfied with prosecuting their state law causes of action.

The parties agree that the order granting attorney fees has no basis other than the PMPA. (15 U.S.C. § 2805, subd. (d)(1)(C).) Since we have held that the trial court lacked jurisdiction under the PMPA, it follows that the trial court lacked power to award attorney fees under the PMPA.

Finally, Thrifty contends that the trial court erred in compelling arbitration of its cross-complaint against Gulf. We agree.

Article 17 of the Gulf-Thrifty contract provides remedies for each party should the other breach the purchase agreement. Subdivision (a) states that if Thrifty

breaches, Gulf may retain one quarter of the earnest money as liquidated damages, "provided, however, Gulf may elect not to accept the earnest-money deposit as liquidated damages, and may instead, *avail itself of all rights, powers and remedies now or hereafter existing at law or at equity, by statute or otherwise, including the right of specific performance.*" (Emphasis added.) The emphasized portion of subdivision (a) permits Gulf to go to court to pursue legal and equitable remedies.

Subdivision (b) states that if Gulf breaches, Thrifty "may elect not to demand the return of the earnest money deposit as its sole remedy for Gulf's breach and may instead, institute arbitration proceedings against Gulf pursuant to paragraph 19(e) for the return of its deposit and such damages (in an amount which shall not, in any event, exceed One Million Dollars ($1,000,000)) as may be attributable to such breach of the agreement by Gulf, or at Buyer's option *avail itself of all rights, powers and remedies now or hereafter existing at law or at equity, by statute or otherwise, including the right to specific performance.*" (Emphasis added.)

The emphasized language in subdivision (b) is identical to the emphasized language in subdivision (a). Subdivision (b) states that Thrifty has a choice of arbitration or legal action if Gulf defaults, just as subdivision (a) gives Gulf the choice of liquidated damages or legal action if Thrifty defaults. Equity as well as symmetry and logic demands it. Therefore, the trial court erred when it ordered Thrifty and Gulf into arbitration. The choice was Thrifty's.

The judgment is reversed and remanded with instructions to dismiss the first cause of action. The award of attorney fees is reversed. The order compelling arbitration between Thrifty and Gulf is reversed. The parties are to bear their own costs on appeal.

NOT FOR PUBLICATION

/s/ Roth, P.J.
ROTH

We concur:

/s/ Gates, J.
GATES

/s/ Fukuto, J.
FUKUTO

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B018989
S006012

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JUL 20, 1988
Laurence P. Gill, Clerk
Deputy

ABADJIAN et al., Respondents,
v.
GULF OIL CORP. et. al., Appellants.
and related cases

Respondents' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

KAUFMAN
Acting Chief Justice

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, BEN CESON, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, HERB SCHWEIZER, ARAM SHISHMANIAN, JOE SMIDERLE, AND STEPHEN WEBBER, *Plaintiffs,* *v.* GULF OIL CORPORATION, a Pennsylvania corporation; GULF OIL REAL ESTATE DEVELOPMENT CORPORATION, a wholly owned subsidiary of GULF OIL CORPORATION; ROBERT W. BALDWIN; J. ROGER KEMPLE; TOM OTJEN; JOE MAYERS; GEORGE WILLIAMS; OTTO MEYER; GLEN R. JENSEN, THRIFTY OIL CO., a California corporation; and DOES 1 through 100, inclusive, *Defendants.* AND RELATED CROSS-CLAIMS AND CONSOLIDATED ACTIONS	CV 83-6686: TJH(Px) MEMORANDUM OPINION (Filed March 13, 1984)

This cause of action arises from the decision of Gulf Oil Corporation ("Gulf") to withdraw from the Southern California gasoline market and to sell its service stations in the area to Thrifty Oil Company ("Thrifty"). With the exception of plaintiff Herb Schweizer,[1] each plaintiff

occupies and operates a gasoline service station under a lease originally executed with Gulf before June, 1978. Plaintiffs can be classified into two subgroups according to the marketing plan they have adopted from Gulf. Some of the plaintiffs oeprate their leased service stations under a single supply agreement with Gulf and market fuel purchased from the company using its trademark, trade name and symbol.[2] The remaining plaintiffs operate "unbranded" service stations pursuant to several continuous supply agreements with Gulf. All these stations were included in the service stations Gulf agreed to sell to Thrifty.

The "unbranded" operators allegedly discontinued their use of Gulf trademarks and symbols on the suggestion of the company. Plaintiffs contend that because Gulf had difficulty competing in the Southern California market it decided to create a debranding program for its independent operators. The first amended complaint alleges that in January, 1978, Gulf called a general operators meeting which several plaintiffs attended. (See First Amended Complaint, §14.) According to plaintiffs, Gulf anounced a new marketing program at this meeting, whereby branded Gulf service station operators would debrand their stations and sell Gulf motor fuel without the benefit of trademarks and logos. (See First Amended Complaint, §14.) In exchange, Gulf allegedly promised the proposed debranded operators an increased supply of motor fuel at reduced rates, if they agreed to the new marketing plan. *Id.* Consequently, several operators agreed to adopt this plan.

Following the announced debranding program, Gulf prepared to sell its assets in the Southern California

market to another oil distributor. In 1979, Gulf initially planned to see all of its assets located in the Los Angeles Division, which covered the states of Arizona, California, and Nevada, as part of a "package deal". The available package included Gulf's asphalt plants, its Santa Fe Springs Refinery, and more than three hundred service stations, including the stations leased to the plaintiffs. By September, 1980, Gulf had accepted an offer from Thrifty covering the leased service stations (rather than the entire "package deal") and the parties executed a written agreement (the "1980 Letter Agreement") acknowledging the proposed transaction.

After Gulf notified the independent operators about the Thrifty sale, the relationship between Gulf and the independent operators deteriorated. In August 1981, plaintiffs filed their original complaint in state court alleging several violations of state and federal law. Most of the counts in the complaint were premised on state law. The state counts involved claims for fraud, violations of the California Franchise Investment Law, estoppel, unfair competition and requests for declaratory and injunctive relief arising from an alleged conspiracy between Gulf and Thrifty to violate plaintiffs' rights under both state and federal law. Thrifty sought unlawful detainer actions against the leasees as their new landlord.

The alleged federal question jurisdiction arises from plaintiffs' claim that the September, 1980, sales agreement between Thrifty and Gulf terminated plaintiffs' franchises and obligated Gulf, under the provisions of the Petroleum Marketing Practices Act (the "PMPA"), 15 U.S.C. § 2801 *et. seq.*, to offer plaintiffs first refusal rights before closing the Thrifty sale. In opposition, Gulf argues:

(1) whether there is a franchise relationship with each plaintiff, and (2) if yes, then the franchise relationship has been assigned to Thrifty as part of the sale of assets transaction. Thus, the defendants claim none of plaintiffs' rights have been violated under the PMPA.

In November, 1981, defendants first petitioned for removal to federal court asserting that the amended state complaint alleged a federal question under the PMPA. However, this Court remanded the entire case to state court for the following reasons. First, the Court found jurisdiction over Thrifty unattainable under the Act since Thrifty is not plaintiffs' franchisor. Secondly, the Court found jurisdiction over the claims against Gulf could not be maintained because it could not sever Gulf's claims from the nonremovable claims against Thrifty. Finally, the Court remanded on the grounds that the Ninth Circuit does not recognize pendent party jurisdiction. *See Aldinger v. Howard*, 513 F.2d (9th Cir. 1975), *aff'd*. 427 U.S. 1 (1976).

Defendants now seek a second opportunity at removal. This most recent removal petition, filed October 17, 1983, contends that plaintiffs' October, 1983, filing of a motion for summary adjudication in state court under the PMPA justifies removal to federal court. At the subsequent removal hearing, the Court requested additional information concerning the merits of defendants' claim that Thrifty is a franchisor as contemplated under the Act. Defendants submit the Santa Fe Springs Refinery Contract ("SFSR Contract"), which assigns Gulf's rights in supply agreements with independent dealer-operators to Thrifty, as proof supporting their renewed claim of federal jurisdiction of the counts relating to Thrifty. Thus,

the Court faces a reconsideration of its earlier remand order and addresses the issue of defendant's timeliness in this second removal petition.

Timeliness of the Present Removal Petition

Plaintiffs are generally considered the masters of their complaints and free to decide the forum in which to bring an action. However, Congress has provided a mechanism for a defendant to gain access to a federal tribunal though the plaintiff brings his action in state court. Under the removal statute, a defendant need only show that the removal petition is timely filed and that a federal court has original jurisdiction over the action. 28 U.S.C. § §1446(b) and 1446(a).

Section 1446(b) sets forth a thirty day limitation for filing a petition once a basis for removability exists. Here, plaintiffs assert that defendants second removal petition, filed October 17, 1983, is untimely and should relate back to the filing date for the original complaint, not the date when plaintiffs filed for summary adjudication in state court. Thus, plaintiffs argue this Court lacks jurisdiction over the petition.

However, the statutory time limit for removal petitions is merely a "formal and modal requirement"; it is not jurisdictional. *See Fristoe v. Reynolds Metal Co.*, 615 F2d 1209, 1212 (9th Cir. 1980); 1A *Moore's Federal Practice and Procedure* ¶ 0.168[3.-5] (1974 ed.). Even if the Court adopted the relation back argument, plaintiffs would be estopped from objecting to the timeliness of the removal petition, since defendants' present petition for removal is based on plaintiffs' own October 5, 1983 motion for summary adjudication of actions arising "under PMPA." *Id.*

At a minimum, the court may find that plaintiffs most recent summary judgment motion extends the time period for defendants to file a removal petition. Moreover, the plain language of the removal statute provides that the thirty day period commences after defendants receive "a copy of an amended pleading, *motion*, order or other paper" from which removability can be ascertained. § 1446(b) (emphasis added). Thus, defendants' petition falls within the necessary time limitation.

Theories for Removability

In a removal action action involving multiple defendants, movants can invoke several theories to support federal jurisdiction. They can remove on the grounds that the cause of action arises under federal law, or they can rely on diversity of citizenship, or they can remove under the pendent party theory. 28 U.S.C. § 1441; *See also Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd.*, 427 U.S. 1 (1976); *Schroeder v. TransWorld Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983). In the present action, diversity and pendent party jurisdiction are unavailable to these defendants. The complaint indicates that several defendants, including Thrifty, are California residents or citizens, thus, complete diversity does not exist as to them. In addition, the Ninth Circuit strongly disapproves of pendent party jurisdiction unless the parties can show an independent ground of jurisdiction exists over the claims against against the pendent party. *See, Benson v. U.S. Small Business Administration*, 644 F.2d 1366, 1367 (9th Cir. 1981); *Libby, McNeil, and Libby v. City National Bank*, 592 F.2d 504, 510 (9th Cir. 1978); *Avala v. United States*, 550 F.2d 1196 (9th Cir. 1977). Therefore, this

Court's decision on removability turns on the federal character of the claims against Thrifty.[3]

The Merits of Federal Jurisdiction in this Case

Federal jurisdiction under the PMPA must be decided on the merits because the jurisdictional issue and substantive issues are so intertwined with the resolution of crucial facts. *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983). In PMPA cases, the Ninth Circuit has instructed the district courts to avoid dismissal for lack of subject matter jurisdiction solely on the face of the pleadings. *Id.* at 139-40. Relying on the *Sun Valley* holding, defendants contend the Ninth Circuit has prohibited jurisdictional fact finding under PMPA without a trial on the merits. Thus, they argue that by asserting a federal claim against Thrifty on the face of their papers plaintiffs have created a jurisdictional issue which must be resolved at trial.

This Court does not read the holding of *Sun Valley* as broadly as defendants wish. In ruling on a challenge to subject matter jurisdiction, a district court is ordinarily free to hear evidence regarding jurisdiction before trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill Publishing Co. v. General Telephone and Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 979). Courts *have been careful to distinguish* between the *standards* of jurisdictional analysis *under motions to dismiss and jurisdictional fact finding in summary judgment proceedings. Augustine*, 704 F.2d at 733-34. In *Sun Valley*, the district court dismissed, pursuant to Fed. R. Civ. P. 12(h)(3), ten counts of the

complaint that alleged PMPA violations on the grounds defendant noted the absence in the complaint of an allegation regarding defendants ability to use a refiner's trademark, commonly referred to as "branding authority." *Sun Valley*, 711 F.2d at 139. Later, the court of appeals refused to uphold the dismissal of the PMPA claims without specific jurisdictional fact finding by the court under the Act. *Id.* at 141. However, the court of appeals left open the district court's ability to resolve PMPA jurisdictional questions in summary judgment proceedings by noting, "[w]e do not exclude the possibility that these claims may be suitable for Rule 56 disposition." *Id.*

In an exemplary pretrial proceeding where the party seeking dismissal prevailed, the court had an opportunity to develop substantial evidence on the interrelated jurisdictional and factual issues under the rigorous standards of Rule 56. *See Thornhill*, 594 F.2d at 735-36 (Sherman Act case in which Ninth Circuit affirmed summary judgment on the issue of interstate commerce under the Act after reviewing deposition testimony and exhibits). Similarly, in the instant case, this Court has had an opportunity to conduct an extensive review of the record and of matters outside the pleadings to resolve the material issues. The parties seeking remand will prevail on the basis of the undisputed material facts and underlying law. However, my decision is limited solely to the questions relating to jurisdiction over the claims against Thrifty.

The purpose of PMPA is to establish "minimum Federal Standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." *Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 7 (2d Cir.

1982), *quoting* S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873 (emphasis added). Congress enacted PMPA to protect franchisees from arbitrary or discriminatory termination of their franchises. S. Rep. No. 95-731, *supra* at 874. The Act limits the termination of any franchise except on the specifically enumerated grounds and upon compliance with notice requirements. 15 U.S.C. § §2802(a), (b)(1). Crucial elements that extend jurisdiction under the Act are the existence of a franchise relationship and the occurrence of an event within the regulatory scheme of the statute. *See* 15 U.S.C. §2802.

The status of Gulf as plaintiffs' initial franchisor is undisputed. Both the branded and unbranded dealers operated their stations under supply agreements with Gulf which predated June, 1978. Even the unbranded dealers sold Gulf gasoline under the company's trade name before the new marketing program in 1978. Thus, the branded dealers operate under a franchise agreement described in 15 U.S.C. §2801(1)(A); the unbranded dealers operate under a franchise within the reach of 15 U.S.C. § 2801(1)(B) (ii)(II). The triggering event for PMPA jurisdiction over these dealers arose when Gulf allegedly terminated the dealers franchises. The claims against Thrifty arises from the same nucleus of facts. Therefore, defendants can properly remove this action only if independent grounds of federal jurisdiction can be established over Thrifty.

The absence of an independent franchise agreement between Thrifty and plaintiffs defeated defendant's first attempt at removal. Defendants now contend that Gulf's assignment under the SFSR contract to Thrifty created a

"franchise relationship" between Thrifty and plaintiffs. However, the record lacks any evidence of a subsequent contract between Thrifty and plaintiffs; the record lacks any proof of a marketing plan by Thrifty for plaintiffs; finally, the parties do not mention the existence of any franchise fee imposed upon plaintiffs by Thrifty. All of the above items are essentially components of a franchise agreement. *See e.g.* Cal. Corp. Code §31005 (West 1977); *See also* 34 Cal. Jur. 3d, *Franchise, Distribution, and Dealership Contracts* §1 (3d ed. 1977).

Moreover, the issue of Thrifty's lack of Gulf trademark rights is undisputed. Thrifty generally asserts that the SFSR contract included "branding authority or trademark rights", but it points to the specific terms of that agreement noting, "Although, in general, 'Gulf indicia' are excluded from the sale under paragraph 2.07 of the SFSR Contract. . . ." See Thrifty's Supplemental Memorandum In Support of Jurisdiction at 4.[4] This Gulf indicia represents the trademark rights essential to finding a valid franchise relationship. *See* 15 U.S.C. § §2801 (1)(B)(i) and (2).[5]

In defining the "franchise relationship" under PMPA, the Congress recognized the interrelated nature of the leased premises with the motor fuel supply agreement in petroleum franchises. The Senate noted:

> The franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in that the franchisor commonly not only grants a trademark license, but often controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition, the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal item: motor fuel.

S. Rep. No. 95-731, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S. Code Cong. & Ad. News 873, 875. Thus, it appears at *first glance* that Congress intended PMPA to reach every motor fuel supply agreement where the supplier is the primary source of fuel or the exclusive source. This broad reading of the statute could bring Thrifty within the definition of a franchisor "but for" the limiting language noted further in the legislative history. "The term 'franchise' is defined in terms of a motor fuel trademark license. It should be noted that the term is applicable *only to the use of a trademark* which is owned or controlled by a refiner." *Supra* at 888 (emphasis added).

Although the Ninth Circuit remains silent on whether branding authority is essential to the existence of a franchise relationship under PMPA, see *Sun Valley*, 711 F.2d at 141, most courts favor the express need for granting trademark use to support a finding of a franchise relationship. *See Lasko v. Consumers Petroleum of Connecticut, Inc.*, 547 F. Supp. 211, 219 (D. Conn. 1981) (implying necessity of branding authority), *and Blackwell v. Power Test Corp.*, 540 F. Supp. 802, 807 (D.N.J. 1981) (SAME), *aff'd. mem.*, 688 F.2d 818 (3d Cir. 1982). Given the emphasis placed on the use of trademark rights in PMPA cases, only two alternative theories could possibly provide jurisdiction over Thrifty absent branding authority by Gulf. Either the Court must find (1) a valid assignment of the franchise relationship by Gulf to Thrifty, or (2) it must find that Gulf and Thrifty's sales transaction involved a less than arms length deal between the parties. *See Bsales v. Texaco, Inc.*, 516 F. Supp. 655, 661 (D.N.J. 1981) (cited for the latter proposition).

The legislative history of PMPA allows the assignability of a petroleum franchise as provided by state law. S. Rep. No. 95-731, *supra* at 901. In the absence of an express agreement, the applicable California statutes "clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts." *Farmland Irrigation Co. v. Dopplmaier,* 48 Cal. 2d 208, 222, 308 P.2d 732, 740 (1957); *See* Cal. Civ. Code §14581 (West 1982); *see also,* Cal. Comm. Code § 2210 (West 1968).[6] But, a closer analysis of the PMPA legislative history reveals a district court's ability to invoke its equitable powers and preempt state law on assignability to comply with the overall scheme of the Act:

> [T]here is an area in which Federal termination provisions under this legislation and state-granted rights of assignability of a franchise man conflict. It is intended that the harmonizing of these competing interests be left to judicial balancing of competing equities on a case-by-case basis. No hard and fast statutory rule would accomplish the desired goal of harmonizing the competing statutory objectives as equitably as application of general principles of equity to specific fact situations.

S. Rep. No. 95-731, *supra* at 901.

Under PMPA, a franchisor's withdrawal from a relevant geographic market can amount to a termination of non-renewal of the franchise agreement that triggers both notice and first refusal rights for franchisors. *See* 15 U.S.C. §2802(b)(2)(E). The undisputed facts indicate that Gulf intended to seel all its assets in the Los Angeles Division and to withdraw from the highly competitive Southern California gasoline market.[7] The subsequent actions taken to see plaintiffs' leased premises and the

Santa Fe Springs Refinery are incidental to Gulf's stated purpose: market withdrawal. For this Court to find that the "package deal" involving Thrifty amounted to an assignment of the "franchise relationship," and not a market withdrawal, would result in the complete circumvention of the Act. Thus, it is my determination view that Thrifty cannot hold the same status as a franchisor to these plaintiffs as held by Gulf. At most, Thrifty may have an assignment of the leased premises under state law if Gulf complied with PMPA in the first instance.

As a general rule, a contractual relationship between the individual parties is a precondition for jurisdiction under PMPA. *See Bsales*, 516 F. Supp. at 662 N.4. However, a second alternative theory for PMPA jurisdiction over a noncontractual third party such as Thrifty involves a judicially recognized, narrow exception to the franchise relationship rule. In *Bsales*, the district court implied in *dicta* that through an "extraordinary situation" a landlord of premises used in a franchise operation may owe certain duties to the franchisee, even though the landlord is not a franchisor. 516 F. Supp. at 661. The district court noted:

> [I]f the landlord and the franchisor enter into a lease which is *not the product* of arm's length negotiations and that lease expires and is not renewed, then the franchisee may have a cause of action [under PMPA against both the franchisor and the landlord. Similarly, the absence of an arm's length relationship between the franchisor and the landlord at the time that an option to renew a lease is under consideration might give the franchisee rights against both parties, if the option is not exercised.

Id. at 661 (emphasis added)

In *Bsales*, similar to the allegations in this case, plaintiffs alleged a conspiracy existed between the franchisor and the landlord to deprive plaintiffs of their rights under PMPA. The district court did not find a conspiracy between the parties in the absence of "direct and explicit evidence of such a conspiracy." 516 F. Supp. at 662. The court concluded that an inference of a conspiracy could not be made merely by an allegation that the defendants negotiated with their own interest in mind, absent proof that the franchisor exercised control over the new landlord. *Id.* at 662-63. Even a party's negotiating in bad faith is not actionable under this theory. *Id.* at 663 n. 8.

The instant plaintiffs argue that defendants conspired to terminate their service station leases and deprive plaintiffs' of their first refusal right under PMPA. (See First Amended Complaint ¶33b.) The only evidence plaintiffs allege establishes a conspiracy between defendants Thrifty and Gulf is the SFSR contract and the September 1980 letter agreement, but the undisputed facts demonstrate these agreements resulted from vigorous negotiations to purchase Gulf's Los Angeles Division assets *after* Gulf decided to withdraw from that market. Although Gulf and Thrifty entered into a sales agreement that included the stations leased by plaintiffs, this Court finds plaintiffs have offered no evidence establishing an intent by either defendant to circumvent the Act. Nor is there any evidence that Gulf in any way controlled Thrifty's actions during their negotiations or anytime afterwards. While the complaint properly alleges, *inter alia*, Gulf failed to comply with the notice, termination, and first refusal rights of plaintiffs as

required by PMPA, these allegations are unrelated to any proven conspiracy between Gulf and Thrifty.

CONCLUSION

Having decided that the claims against Thrifty do not arise under PMPA, the Court no longer has an independent basis of subject matter jurisdiction to entertain plaintiffs state law claims against Thrifty. Limitations on the Court's power to exercise "pendent party" jurisdiction and the interrelatedness of the claims against all the defendants requires this Court to remand the entire case. Thus, the motions of plaintiffs for remand to state court are granted and the Court does not make any further findings.

Date: March 9, 1984

Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge

FOOTNOTES

1. Plaintiff Herb Schweizer was one of several Gulf dealers to whom Gulf offered a right of first refusal to acquire its interest in the service station. Schweizer accepted Gulf's offer and thus has no claim against it for noncompliance with the Petroleum Marketing Practices Act, 15 U.S.C. §2801 *et seq.*

2. These plaintiffs are catagorized as "branded dealers." They are identified as Jack Abadjian, Brad May, and Al Rosenstein.

3. Since the Court has already determined that the claims against Gulf and Thrifty are inextricably intertwined, removability under 28 U.S.C. §1441(c) is also unavailable to these defendants. Section 1441(c) provides that a separate and independent federal claim may be joined with otherwise nonremovable state claims, thereby permitting removal of an entire action to federal court.

4. In addition, Barry W. Berkett, Vice President and Assistant Secretary of Thrifty Oil Co., testified through deposition testimony that he was unaware of any of the plaintiffs ever purchasing motor fuel from Thrifty as of December 2, 1983 (Berkett deposition at 16).

5. Thrifty has not, as of December 2, 1983, granted any of the plaintiffs the right to utilize the Gulf trademark (Burkett deposition at 36).

6. A contract may be nonassignable if the duties imposed upon one party is of such a personal nature that their performance by someone else would in effect deprive the contracting party of the benefit of its bargain. *See Dopplmaier,* 48 Cal.2d at 222, 308 P.2d at 740. It is possible that a franchise agreement involving trademark rights is such a contract, however, the present decision rests strictly on an interpretation of the federal statute involved in this case leaving questions of franchise agreement assignability to the state court for its resolution.

7. See I. Roger Kemple's deposition testimony at 78-79; 99-100.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK ABADJIAN, et al., Plaintiffs-Appellees, vs. THRIFTY OIL COMPANY, Defendant/Appellant, GULF OIL CORPORATION, a Pennsylvania corporation, et al., Defendants.	No. 84-5831
	DC# CV 83-6686 TJH Central California
	ORDER
	FILED July 3, 1984
AND RELATED CROSS-CLAIMS AND CONSOLIDATED ACTIONS	

Before: KENNEDY, ALARCON and FERGUSON, Circuit Judges

The appeal from the district court remand order is dismissed. *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 343, 346 (1975).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GULF OIL CORPORATION, a Pennsylvania corporation, et al., Petitioners, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, JACK ABADJIAN, et al., Real Parties in Interest.	No. 84-7330 DC# CV 83-6686 TJH Central California ORDER FILED Aug 22, 1984 PHILLIP B. WINBERRY Clerk, U.S. Court of Appeals

Before: ANDERSON, FARRIS and BOOCHEVER, Circuit Judges

The petition for writ of mandate is denied. Petitioner has not met the requirements of this circuit for extraordinary relief. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977)

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date DECEMBER 10, 1984
HONORABLE RONALD E. SWEARINGER JUDGE
___ Deputy Sherriff ___, Deputy Clerk
A.CARRASCO Court Attendant C HERNANDEZ, Reporter
NONE (Parties and counsel checked if present)

C 377 024 C/W C399330, C406851, C406852, C406853, C406854, C406855, C406857, C406858, C407545, C409749, C410941, C410942

Counsel for Plaintiff

Counsel for Defendant

JACK ABADJIAN, et al
VS
GULF OIL CORPORATION, et al

NATURE OF PROCEEDINGS:
RULING ON MOTIONS FOR SUMMARY JUDGMENT

The matters having been argued and submitted and the Court having considered the contents of the moving and responding papers and the authorities therein cited rules as follows:

PLAINTIFF'S MOTION:
Plaintiff's motion is granted. The Court finds the following issues to be without substantial controversy and are established in favor of Plaintiffs and against Defendants;

a. The September 30, 1980 agreement between Defendants was an event and an action that gave to each moving Plaintiff a right of first refusal to purchase Gulf's interest in their respective service stations.

b. Under the PMPA Defendant Gulf was obligated to offer each moving Plaintiff the right as aforesaid at least 45 days prior to the agreed upon closing date of the Gulf sale to Thrifty (may 1981).

GULF'S MOTION FOR SUMMARY JUDGMENT:

Gulf contends that Plaintiffs may not obtain state court relief for alleged franchise discontinuance because relief has not been sought under PMPA. Gulf further contends that PMPA preempts any state law dealing with alleged franchise termination.

Plaintiffs contend that they may obtain state court relief on the gravamens alleged in their complaints. *The Court agrees.* Counts 1, 6 and 7 relate to rights under the PMPA and PMPA Jurisdiction is not exclusively in the Federal Courts in the context of this proceeding.

Plaintiffs concede that to the extent that they have claims under Section 20999.1 Business and Professions Code, that Section has been preempted by the PMPA.

Count 2 is particulary preempted. Counts, 3, 4 and 5 are not based on alleged franchise termination as per PMPA but relate to other gravamen.

The moving party asks the Court to determine that the PMPA has preempted the field, contends that plaintiffs have taken the position that they are not proceeding under PMPA and that certain causes of action may not be pursued. The Court concludes that moving party is incorrect.

The motion is a hybrid, but the issues presented may be decided by the Court pursuant to *Beech Aircraft v. Superior Court* (1976) 61 Cal. App. 3d 501, 516.

The motion is denied.

THRIFTY'S MOTION FOR SUMMARY JUDGMENT RE IMPAIRMENT:

Thrifty contends that if Section 20999.25, Business and Profession Code were applied to the dispute, the obligation of the Gulf/Thrifty contract would be impaired since the Section was not in effect when the agreement was made.

This issue is moot since PMPA preempts Business and Professions Code Section 20999.25 (Cal Arco Distributors V. Atlantic Richfield) and Plaintiffs acknoledge this.

The motion is denied.

THRIFTY'S MOTION RE TERMINATION:

The motion is denied, the basis for the motion being obviated by the Court's ruling as to Plaintiffs' motion.

It is to be noted that the question of "termination" presented in the case does not relate to ordinary termination but must be considered in the context of the Petroleum Marketing Practices Act and the Court notes and concurs in the finding of Judge Terry Hatter of the United States District Court that Thrifty cannot be considered as a successor franchisor by assignment.

Copies of this minute order are mailed Via U.S. mail addressed as follows:

JACK D. FUDGE
RALPH ZAREFSKY
LOUIS A. KARASIK
MARY E. TARDUNO
McCutchen, Black, Verleger & Shea
600 Wilshire Boulevard
Los Angeles, California 90017;

KENNETH P. ROBERTS, ESQUIRE
Shapiro, Laufer, Krane, Jacobson & Posell
2029 Century Park East
Suite 2600
Los Angeles, California 90067;

DONALD C. SMALTZ, ESQUIRE
Smaltz & Nelley
530 West Sixth Street
10th Floor
Los Angeles, California 90051/.

APPENDIX G

PETROLEUM MARKETING PRACTICES ACT,
15 U.S.C. §§ 2801-2806

SUBCHAPTER I–FRANCHISE PROTECTION

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract–

(i) between a refiner and a distributor.

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailor or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes–

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed–

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(III) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner of distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who-

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who pruchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under said franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include–

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship–

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area

as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce–

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may–

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if–

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure–

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if–

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence–

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if–

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days

prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if–

(i) such determination–

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by

employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises–

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if–

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if–

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by

the franchisor in good faith and in the normal course of business, if–

(i) such determination is–

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operations by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either–

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an

offer, made by another, to purchase such franchisor's interest in such premises.

Definition

(c) As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as–

(1) fraud or criminal misconduct by the franchisee relevent to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise–

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in

part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for–

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

(d) In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)–

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises Nonapplicability of statutory nonrenewal provisions

(a) The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship–

(1) under a trial franchise; or

(2) under an interim franchise.

Definitions

(b) For purposes of this section–

(1) The term "trial franchise" means any franchise–

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously–

(i) that the franchise a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of

the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise–

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal–

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously–

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor

fuel through retail outlets in the relevant georgraphic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

Nonrenewal upon meeting statutory notification requirements

(c) If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship–

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if–

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§2804. Notification of termination or nonrenewal of franchise relationship

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship–

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section–

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor–

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins–

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall–

(A) furnish notification to the franchisee not less than 180 days prior to the date of which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

Manner and form of notification

(c) Notification under this section–

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain–

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

Preparation, publication, etc., of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§2805. Enforcement provisions
Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of–

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b)(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunction relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if–

(A) the franchisee shows–

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injuctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under

subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced–

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

Burden of proof;
burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled–

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that–

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business–

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

§2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

APPENDIX H

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 1'39, § 84, 63 Stat. 102; July 2, 1964, Pub.L. 88-352, Title IX, § 901, 78 Stat. 266.

No. 88-674

(2)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JACK ABADJIAN, MARK BALL,
JOSEPH BROWN, JOHN EGHENIAN,
BRAD MAY, NASSIR MAZAREI,
DONALD PROUSE, AL ROSENSTEIN,
ARAM SHISHMANIAN, JOE SMIDERLE
and STEPHEN WEBBER,
Petitioners,

v.

GULF OIL CORPORATION, a
Pennsylvania corporation,
THRIFTY OIL CORPORATION, a
California corporation,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two

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BRIEF IN OPPOSITION OF RESPONDENT THRIFTY OIL CO.

DONALD C. SMALTZ
(Counsel of Record)
LEIGHTON M. ANDERSON
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-First Floor
Los Angeles, California 90017
Telephone: (213) 612-2500
Attorneys for Respondent Thrifty Oil Co.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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COUNTER-STATEMENT REGARDING PARTIES TO THE PROCEEDING BELOW, INCLUDING LIST OF AFFILIATED CORPORATIONS

A. Pursuant to Rule 28.1, respondent Thrifty Oil Co. certifies that it does not have any parent companies, affiliates or subsidiaries except wholly owned subsidiaries.

B. Under the heading "Parties to the Proceeding Below," the petition for a writ of certiorari contains the material misstatements and omissions noted below:

1. The parties to the proceeding below also included plaintiff Ben Ceson ("Ceson"). However, Ceson is not a petitioner and may no longer have an interest in the case.

2. The petition includes the gratuitous assertion that "all Petitioners met the definition of 'franchisee' [as defined in the PMPA]." (Pet. at ii.) Although the state trial court made a finding to this effect, respondent Thrifty Oil Co. appealed that determination.* The court below did not reach the issue, in light of its ruling that it did not have subject matter jurisdiction.

3. The petition erroneously refers to "Respondent Mobil Oil Corporation." *Id.* Mobil Oil Corporation has never been a party to this case.

4. The petition erroneously contends that Thrifty is *not* a party "to the issues presented to this Court." *Id.* That contention is impossible to sustain in light of the fact that Thrifty was the appellant in the court below, which reversed an adverse judgment of the trial court. (Pet. App. 1.)

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* Thrifty's appeal was raised on the grounds, *inter alia*, that all but three of the petitioners had *terminated* their prior "franchise" relationship with respondent Gulf Oil Corporation, and had entered into new agreements on a non-franchised basis.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-674

JACK ABADJIAN, MARK BALL,
JOSEPH BROWN, JOHN EGHENIAN,
BRAD MAY, NASSIR MAZAREI,
DONALD PROUSE, AL ROSENSTEIN,
ARAM SHISHMANIAN, JOE SMIDERLE
and STEPHEN WEBBER,
Petitioners,

v.

GULF OIL CORPORATION, a
Pennsylvania corporation,
THRIFTY OIL CORPORATION, a
California corporation,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two

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BRIEF IN OPPOSITION OF RESPONDENT THRIFTY OIL CO.

INTRODUCTION

After seven years of litigation, the California courts have finally reached the correct result and have rejected petitioners' unfounded claims under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 *et seq.* Applying directly applicable case authority, the

court below held that PMPA actions are within the exclusive jurisdiction of the federal courts. On two previous occasions, petitioners had defeated defendants' right to a federal forum by expressly disclaiming their reliance on the PMPA and obtaining remand orders. As a direct result of petitioners' tactical maneuvering, the case was finally submitted to a state court judge who characterized the PMPA as "lousy legislation" and "a poorly drafted federal statute that is very hard to understand. . . ." The state trial court entered judgment requiring respondent Gulf Oil Corp. ("Gulf") to sell petitioners' leased service station premises to them, rather than to respondent Thrifty Oil Co. ("Thrifty").

This action was filed in 1981, after Thrifty entered into its contract with Gulf to purchase more than 300 of Gulf's service station properties in the Southwest. A group of dealers, now petitioners before this Court, sued in state court to block the sale and force a sale to themselves on the same terms. However, petitioners cannot demonstrate the existence of that alleged right in the letter or the spirit of the PMPA. While the PMPA was enacted only to protect service station "franchisees" from arbitrary or discriminatory terminations or nonrenewals, petitioners were never terminated or nonrenewed in any alleged "franchise" until they each rejected Gulf's offers in 1981-82 to extend the dealership contracts for a new term after their expiration date. Even though petitioners rejected Gulf's renewal offers, they have retained actual possession of the station properties for the last seven years, while using their unfounded federal-law claims as an impediment to any eviction proceedings. Petitioners have also stopped paying rent, so that their continued occupation has been on a rent-free basis.

In ruling that the PMPA claims could not be adjudicated in state court, the court below did not reach the merits of petitioners' claims. However, out of the hun-

dreds of cases decided under the PMPA since its enactment in June 1981, no court other than the trial court in this case has ever accepted the "first refusal" right which petitioners assert they had. Moreover, no court has ever accepted the procedural argument which petitioners now assert, namely, that the state courts allegedly do not have jurisdiction to consider their own jurisdiction in a case which has been removed to federal court and thereafter remanded. The rule against appellate review of remand orders does not divest the state courts of any jurisdiction that existed prior to removal, nor does it confer jurisdiction on the state courts that they would not otherwise have had.

The questions purportedly presented by the petition are far from "certworthy," because they are each intertwined with the unique procedural circumstances of this case. Those circumstances include petitioners' disclaimers in federal court that, "We have not purported to allege a cause of action under the Petroleum Marketing Practices Act . . . ." The circumstances also include a rare form of error by the federal district court, which remanded the removed action to state court despite the acknowledged existence of a federal claim. Even if this error cannot be reviewed, it need not—and should not—be compounded.

Thus, there is no issue of general importance to warrant Supreme Court review. After seven years of litigation, the court below penetrated petitioners' unmeritorious contentions and concluded that petitioners' exclusive remedy was to have their claims adjudicated in an action filed in federal court. The fact that petitioners made a conscious decision not to pursue a federal court remedy does not change the correctness of this ruling, which should be allowed to stand and to bring this protracted litigation to an end.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

In July 1978, Gulf decided to withdraw from gasoline marketing in the Southwest. Even prior to that decision, Gulf had been offering inducements to its retail service station dealers if they would terminate their "Gulf" branded franchise agreements, and enter into new agreements on an "unbranded" basis.[1] As a result of the planned withdrawal, Gulf needed to dispose of more than 300 service station properties in California, Arizona and Nevada.

In July 1980, Thrifty offered to purchase those stations for cash, and a written contract was executed by Gulf and Thrifty on September 30, 1980. That contract expressly provided that "Gulf will continue to supply gasoline directly to existing dealers who [will] continue to operate stations purchased by [Thrifty]." Gulf and Thrifty also agreed to comply with the provisions of the PMPA to the extent it applied to any affected dealer.[2]

After the contract was signed, Gulf informed its dealers that "you will be given notification and the offer required by the [PMPA] to acquire the station [you occupy] yourself." Gulf's Vice President, Mr. Kemple, testified that the intent of the letter was only to assure

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[1] Seven of the petitioners accepted Gulf's offer of "unbranded" gasoline supply agreements. Three of the dealers declined the offer, and their contracts were then renewed on a "Gulf" branded basis. The eleventh petitioner, Stephen Webber, did not become a party to a motor fuel supply relationship with Gulf until April 7, 1979, and Gulf did not offer a branded relationship to him.

[2] During the negotiations, Gulf's representatives suggested that some of its retail service station dealers might have the right under the PMPA to purchase the service stations they were currently occupying under lease agreements. However, Gulf's representatives appeared confused concerning the effect of the PMPA, and no resolution was reached except to provide that the parties would honor whatever rights actually existed under the statute.

the dealers that their rights, *if any*, would be accommodated. Despite that intention, Gulf began to issue "Notices of Nonrenewal" to some of its dealers, which cited Gulf's decision to sell the stations as the basis for the nonrenewal and which contained an offer to sell the leased station to the affected dealer. During December 1980 and January 1981, Gulf cancelled its contracts with five of its dealers (none of whom became plaintiffs in this case) by allowing those dealers to purchase their stations.

When Thrifty learned that stations included in its purchase contract were being sold to third parties, Thrifty notified Gulf that its conduct constituted a material breach of the agreement. After review, Gulf's attorneys agreed with Thrifty that the dealers did *not* have a right of first refusal. As long as the dealers' leases and supply agreements were not being disturbed, Gulf acknowledged that the PMPA was not implicated and that Gulf could not obtain a unilateral benefit (cancellation of its gasoline supply obligation) by depriving Thrifty of stations conveyed under the contract.

After reaching this conclusion, Gulf requested an extension of the escrow period so that it could either renew its agreements with the dealers or persuade them to terminate their relationship with Gulf by mutual consent. Commencing in July 1981, Gulf offered three-year renewal agreements to each of its dealers, including petitioners, which were on the same terms as the existing lease and supply agreements, except for an increase in the amount of rent.[3] However, each of the petitioners refused these offers for a continued relationship.[4]

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[3] The rent was proposed in accordance with Gulf's national rent policy. The dealers disputed Gulf's evidence on this issue, but the issue was never tried.

[4] Commencing on September 10, 1981, Gulf issued Notices of Nonrenewal to petitioners, based on their refusal to agree to the renewal offers. When petitioners refused to vacate the leased

II. PROCEDURAL HISTORY.

Petitioners filed the Complaint against Gulf and Thrifty in Los Angeles County Superior Court on August 3, 1981. The Complaint and the Amended Complaint, which was filed shortly thereafter, alleged that Gulf's dealers had the right to purchase their leased service stations on a first refusal basis. The Amended Complaint expressly cited the PMPA in support of that claim.

On September 14, 1981, Gulf and Thrifty removed the Amended Complaint to the United States District Court for the Central District of California. However, petitioners argued that the action only sought *state law* remedies based on *state law* theories, asserting that "[W]e have not purported to allege a cause of action under the Petroleum Marketing Practices Act . . . ." Petitioners also argued that since Thrifty was not a "franchisor" for purposes of the PMPA's enforcement provisions, 15 U.S.C. § 2805(a), Thrifty must be a party only to pendent state law claim (i.e., a "pendent party") over whom the federal court could not acquire jurisdiction. The district court adopted petitioners' arguments and remanded the entire action to state court on January 4, 1982.

Without ever filing any further amendment to their complaint, petitioners then proceeded in state court to file a motion "under PMPA" for partial summary judgment.[5]

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premises, Gulf filed unlawful detainer actions against them. However, Gulf has never conveyed the properties to Thrifty as required under the contract, and the litigation at bench includes Thrifty's cross-complaint against Gulf for breach of its contract to convey those station properties.

[5] Earlier, the state court judge then assigned to the case, Judge Schauer, had questioned petitioners' contention that their claims could be asserted as a matter of *state* law. The court asked, "Why do you eschew this idea of bringing an action under the [Petroleum Marketing Practices] Act? . . . Why have you avoided at least theoretically bringing an action under the Act?" The attorney who

Based on this explicit reliance on federal law, defendants again removed the action to the district court on October 17, 1983. However, the same district court judge concluded that "the claims against Thrifty do not arise under PMPA," and that the district court could not entertain these claims. (Pet App. 8, 22.) Even though acknowledging that the claims against Gulf, at least, were within its original jurisdiction, the district court further concluded that it was "require[d] . . . to remand the entire case." (Id.) At no time did the district court raise, address or consider any issue as to whether the state courts had jurisdiction over PMPA claims.

When the action was returned to state court, the parties filed various motions for partial summary judgment. After a hearing, a newly assigned judge ruled that the contract between Gulf and Thrifty was "an event and an action that gave to each moving Plaintiff a right of first refusal." (Pet. App. 26.) The trial judge also held that "PMPA jurisdiction is not exclusively in the Federal Courts . . . ." (Pet. App. 27.) On a subsequent occasion, the judge explained his negative views concerning the PMPA and the federal legislative process, as follows:

> [T]his is an unusually complex problem involving a *poorly drafted federal statute* that is very hard to understand.
>
> You have to get a good grip on your tail before you start reading that PMPA. It is a very complex and complicated and poorly constructed statute.
>
> *It is a classic example of the kind of legislation we get out of the Congress* when the interest of the Congressmen is a self-perpetuation and tending to the interests of all of the lobbyists that perpetuate it.

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was present at the hearing responded that he had not been privy to that decision. Judge Schauer responded, "Its a tortured course—a tortuous course."

> It is lousy legislation. *Its intention is probably very good, but it is expressed very awkward.* It is a terrible job . . . . We don't know what the appellate court is going to do.

After the trial judge had purported to decide the PMPA issue, the remainder of the case was decided on stipulated facts, and a judgment was entered on January 16, 1986. (App. 1a.) The Judgment orders the stations to be sold to the dealers at a price which is only 20% higher than the net book value of the properties on Gulf's records, without any compensation to Thrifty.

Thrifty and Gulf appealed the judgment. On May 8, 1988, the court below reversed the trial court's judgment, holding that petitioners' PMPA claims are subject to exclusive federal jurisdiction. (Pet. App. 1.) Petitioners filed a Petition for Review in the California Supreme Court, which that court denied on July 20, 1988. (Pet. App. 7.)

REASONS FOR DENYING THE PETITION

I. THE QUESTIONS PRESENTED BY THE PETITION DO NOT WARRANT REVIEW BY THIS COURT.

The petition for a writ of certiorari should be denied because neither of the questions presented relate to an issue on which there is any substantial difference of opinion or need for Supreme Court intervention. Moreover, in deciding that it lacked subject matter jurisdiction over the PMPA, the court below correctly applied prior holdings by both federal and state courts, including this Court's opinion in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

In overview, this case concerns petitioners' attempt to obtain an unearned windfall profit on the basis of an unmeritorious allegation that when Gulf sold the approximately 300 service station properties in the Southwest to Thrifty, the PMPA required that the stations occupied

by petitioners to be sold to petitioners at Thrifty's price.[6] Despite petitioners' reliance on a distorted interpretation of the PMPA as their only alleged basis for the purported purchase option, petitioners have sought strenuously at every turn to *avoid* federal court as the forum in which to litigate their claims.

Petitioners' reasons for avoiding the federal courts have nothing to do with the hardships allegedly suffered by "rural" service station dealers in retaining "expensive big city attorneys." (Pet. at 16.) Actually, petitioners all reside and have their businesses in metropolitan Los Angeles, and have employed the same counsel in both the state and the federal court proceedings. However, petitioners were aware that even though the state courts may be less familiar with the PMPA, the state courts in California are more hospitable to claims by service station dealers in actions against "big oil companies," even if those claims are fundamentally lacking in legal or factual merit.

Petitioners' tactical preference for state court proved to be correct in this case, at least initially. In granting each petitioner an option to purchase his leased service station property,[7] the California trial court judge ex-

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[6] The "package" price offered by Thrifty for the more than 300 stations was computed by multiplying Gulf's net book value for the properties by a factor of 1.2 (120%). Although equitable as applied to the transaction as a whole, when a book value appraisal method is applied to the specific locations involved in this case, for purposes of attempting to give petitioners the benefit of Thrifty's price, the result is significant undervaluations in comparison to fair market value.

[7] By contrast, none of the many federal district or circuit courts that have been presented with similar claims under the PMPA have ever awarded "relief" in the form of a forced sale of service station property. *See, e.g., Avramidis v. Atlantic Richfield Co.*, 623 F. Supp. 64, 68 (D. Mass. 1985), *aff'd sub nom. Avramidis v. ARCO Petroleum Products Co.*, 798 F.2d 12 (1st Cir. 1986); *see also Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1390 (9th Cir.

pressed his intention to apply what he believed to be the "good intentions" of the PMPA, even though he found the statute to be "poorly constructed" and "very hard to understand." (*Supra* at 7-8.) While many state court judges do not share that apparent antipathy to federal legislation, the judge's comments illustrate that the principal factors supporting exclusive federal jurisdiction—which are (1) the desirability of uniform interpretation, (2) the expertise of federal judges in federal law, and (3) the greater hospitality of federal courts to federal claims—are all strongly present with respect to PMPA.

Moreover, there is no conflict among the circuits regarding exclusive jurisdiction under the PMPA, because the circuit courts have not had any occasion to address the issue.[8] As far as Thrifty's research has disclosed, *Rustom v. Atlantic Richfield Co.*, 618 F. Supp. 210 (C.D. Cal. 1985), was the first case in which the issue of exclusive jurisdiction under the PMPA was squarely decided.[9] Apparently, the issue did not arise prior to

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1986) ("first refusal" claim advanced under parallel provision of the PMPA; *held*: "[o]ur review of the PMPA discloses no provision giving [the dealer] the right he asserts"); *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988) (no violation of PMPA in the sale of service stations to a third party).

[8] The only possible reference to the issue by a circuit-level federal court was in *Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228, 231 n.1 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 1022 (1980), in which the court's statement that "federal courts have exclusive jurisdiction over the claims raised by Shell" may have included Shell's claims under the PMPA, as well as Shell's claims under the Economic Stabilization Act of 1970.

[9] Previously, in *Ted's Tire Service, Inc. v. Chevron U.S.A., Inc.*, 470 F. Supp. 163, 165-66 (D. Conn. 1979), the court suggested in dictum that PMPA jurisdiction would be concurrent; the court stated that, if the complaint were amended to allege a PMPA claim, the action "would be within the removal jurisdiction of this Court." *Id.* A few courts subsequently cited *Ted's Tire* on this point, also in dictum, without examining the issue. *See, e.g., California Arco Distributors, Inc. v. Atlantic Richfield Co.*, 158 Cal. App. 3d 349, 364, 204 Cal. Rptr. 743 (1984).

Rustom because PMPA cases were being litigated exclusively in the federal courts.[10] After *Rustom*, the doctrine of exclusive jurisdiction over PMPA has been adopted *without exception* by state and federal courts in California.[11] Indeed, only an intermediate-level appellate court in Pennsylvania has subsequently expressed any dissenting view.[12] However, this Court should be aware that the Supreme Court of Pennsylvania has granted

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[10] The only exceptions appear to be *Ricco v. Shell Oil Co.*, 180 N.J. Super. 399, 434 A.2d 1151 (1981), and *Frankard v. Amoco Oil Co.*, 116 Wis. 2d 254, 342 N.W.2d 247 (1983). However, neither court addressed the jurisdictional issue. Indeed, in *Ricco*, the plaintiff took the position that the New Jersey Franchise Practices Act was the controlling law, and asserted contentions under the PMPA only "in the alternative." In *Frankard*, the Wisconsin appellate court stated that any question of whether the PMPA was properly before the trial had been waived, even though plaintiffs did not raise their PMPA claim until five days prior to trial.

In other state court cases cited by petitioners (Pet. at 12), the PMPA was considered only as a collateral issue, *and the courts expressly commented that the franchisee would be compelled to litigate his PMPA claims in federal court. Walters v. Chevron U.S.A., Inc.*, 154 Ga. App. 636, 269 S.E.2d 495 (1980); *Bates v. Chevron U.S.A., Inc.*, 151 Ga. App. 544, 260 S.E.2d 367 (1979); *see also Da Costa's Automotive, Inc. v. Birchwood Plaza Shell, Inc.*, 482 N.Y.S.2d 832, 106 A.D.2d 484 (N.Y.A.D. 1984) (plaintiff did not have standing to assert PMPA). Also, petitioners erroneously state that *Lanham v. Amoco Oil Co.*, 481 F. Supp. 405 (D. Md. 1979), "remand[ed] litigation to the State Court forum for trial on the merits." There is nothing in *Lanham* to support that assertion.

[11] *Elimelekh v. Texaco Refining & Marketing, Inc.*, Bus. Fran. Guide (CCH) ¶ 8663 at 16,751, 16,752 (C.D. Cal. 1986); *Eckel v. Atlantic Richfield Co.*, No. CV 85-8451 (AHS) slip op. (C.D. Cal., January 30, 1986); *Niakan v. Samaan*, 199 Cal. App. 3d 716, 245 Cal. Rptr. 24 (1988), *petition for cert. filed*, September 30, 1988; *Kreisher v. Mobil Oil Corp.*, No. A036017, unpublished portion of opinion (Cal. App., February 5, 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 244 (1988). The opinion of the court below (Pet. App. 1) cited *Niakan* in support of its holding that PMPA is subject to exclusive federal jurisdiction.

[12] *Johnson v. Mobil Oil Corp.*, 364 Pa. Super. Ct. 275, 528 A.2d 155 (1987), *appeal granted*, —— Pa. ——, 544 A.2d 445 (1988).

an appeal on that very issue. *Johnson v. Mobil Oil Corp.*, —— Pa. ——, 544 A.2d 445 (1988).

Moreover, the distinction between exclusive and concurrent jurisdiction in PMPA cases ordinarily has little significance, since PMPA actions may be *removed* to federal court in the rare instances in which they are filed in state court. *See, e.g., Lanham v. Amoco Oil Co.*, 481 F. Supp. at 405. The only reason the issue became important in the case at bench is that the federal court erroneously decided not to accept removal jurisdiction. (Pet. App. 8.) While the problems created by that error were important to the litigants in this case, there is no plausible argument that the issue has any more general significance.

There is also no reason for this Court to entertain the alleged issue relating to whether the district court's remand order foreclosed any subsequent decision that jurisdiction was exclusively in the federal courts. As demonstrated by a recent decision of this Court, the district court's remand order "had no relevance to [the state court's] inquiry into whether the pre-emption doctrine barred the state courts from exercising their jurisdiction." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 315 n.5, 331-332 (1981). An order remanding a case to the state court from which it was removed does not imply that the case was properly filed there, but only that it was removed "improvidently and without jurisdiction." 28 U.S.C. § 1447(c). No issue as to the existence of *state* jurisdiction is necessary to such a determination, and no finding as to state jurisdiction was made by the federal judge in this case.

In sum, the petition has not demonstrated any error by the court below or any significant conflict among lower courts over the questions the petition purports to present. For these reasons, and for the reasons more fully set forth below, the petition for a writ of certiorari should be denied.

II. THE COURTS THAT HAVE FOUND FEDERAL JURISDICTION OVER PMPA CLAIMS TO BE EXCLUSIVE HAVE CORRECTLY APPLIED THE *GULF OFFSHORE* DOCTRINE.

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 458 U.S. 473 (1981), this Court was asked to determine whether federal courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1313 *et seq.* Although the Court concluded that there is no exclusive federal jurisdiction under OCSLA,[13] the Court noted the following general principles of law:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction . . . . *Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly.* Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, *by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests* . . . .

Id. at 478 (citations omitted; emphasis added); *see also Hathorn v. Lovorn*, 457 U.S. 255, 267-68, *reh'g denied*, 458 U.S. 1131 (1982) (suggesting that actions under Sections 5 and 12(f) of the Voting Rights Act may be subject to exclusive federal jurisdiction).[14] In determin-

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[13] In ruling that state courts have concurrent jurisdiction over OCSLA actions, the Court noted, *inter alia*, that the only legislative history material urged as supporting exclusive jurisdiction were the criticisms of two Senators who *opposed* the OCSLA bill. 453 U.S. at 482-83. Further, state laws had been expressly incorporated within the OCSLA statute (*id.* at 480-81), so that state court judges would have as much or more expertise in applying their own state law. *Id.* at 484.

[14] The fact that exclusive jurisdiction may be implicit, rather than explicit, shows that petitioners may not rely solely on the statutory language that PMPA actions "may be brought" in fed-

ing whether federal jurisdiction may be implied from legislative intent or federal policy, the Court also listed three factors to be employed in the analysis:

> [T]he factors generally recommending exclusive federal-court jurisdiction over an area of federal law include *the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims* . . . .

Gulf Offshore at 483-84 (footnotes omitted; emphasis added).

As set forth below, the principles recognized in *Gulf Offshore* strongly support the ruling by the court below that the claim under the PMPA is within the exclusive jurisdiction of the federal courts.

A. Congress' Express Desire for Uniformity of Interpretation Strongly Supports Federal Jurisdiction Over PMPA Cases.

The first of three *Gulf Offshore* factors is "the desirability of uniform interpretation . . . ." [15] In the case of the PMPA, Congress has provided the courts with an explicit, unmistakable declaration of federal policy, as follows:

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eral court. 15 U.S.C. § 2805(a). The antitrust laws are a good example of statute which comes under the exclusive jurisdiction of the federal courts, *General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 287 (1922), even though the relevant enforcement provision states only that persons suffering injury "*may*" sue in federal court. 15 U.S.C. § 15. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), did not hold that the statutory term "may" is a "clear pronouncement of legislative intent" as petitioners contend. (Pet. at 20.) Rather, this Court recognized that other factors must still be considered where state jurisdiction "is not excluded by express provision . . . ." 368 U.S. at 508.

[15] *See also* Note, *Exclusive Jurisdiction of Federal Court in Private Civil Actions*, 70 Harv. L. Rev. 509, 511-13 (1957), *cited with approval in Gulf Offshore*, 453 U.S. at 483-84 nn.12 & 13, and *Hathorn*, 457 U.S. at 266 n.18.

> In recent years, the friction between franchisors and franchisees in marketing of motor fuels has become so great that it has threatened adverse impacts upon the Nation's motor fuel distribution and marketing system. Numerous States have initiated various legislative actions to address these petroleum product franchising problems. These actions have, unfortunately, resulted in an *uneven patchwork of rules* governing franchise relationships which differ from State to State.
>
> *Needed is a single, uniform set of rules governing the grounds for termination and nonrenewal of motor fuel marketing franchises* . . . . Such a set of rules would clearly define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or nonrenewal of the franchise relationship.

S. Rep. No. 731, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 877 ("Senate Report") (emphasis added). In adopting the PMPA, Congress chose to preempt all inconsistent state law so that the PMPA would provide "certainty and uniformity in . . . a nationwide motor fuel distribution and marketing network." *Id.* at 874; *see* 15 U.S.C. § 2806(a).[16]

These clear statements in the legislative history—as well as the text of the PMPA itself—demonstrate that Congress sought to provide both sides of the relationship with the benefit of a "single, uniform set of rules" that would replace the "uneven patchwork" of state regulation. This express federal policy of uniformity is better served if jurisdiction over PMPA is maintained exclusively within the federal system, as compared to spread-

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[16] The fact that States are only empowered to adopt laws which are "the same" as the PMPA, *id.*, is not an argument against exclusive jurisdiction, as petitioners contend. (Pet. at 20.) For example, the fact that States have enacted a variety of antitrust laws does not nullify exclusive federal jurisdiction over the Sherman and Clayton Acts. (See n.14, *supra*.) The PMPA's provision that any State's law must be "the same" only reinforces the principle of uniformity.

ing jurisdiction among myriad additional courts throughout the 50 States.[17] The Congressional declaration of the need for uniformity in the application of the PMPA demonstrates the need for exclusive federal jurisdiction over PMPA claims.

B. The Expertise of Federal Judges Over Federal Claims Also Supports Exclusive Jurisdiction, Particularly Because The PMPA Expressly Mandates The Application of Federal Procedural Rules.

The second *Gulf Offshore* factor supporting exclusive jurisdiction is the "expertise of federal judges in federal law . . . ." In contrast to OCSLA, which relies on legal concepts drawn from each state's law, *Gulf Offshore*, 453 U.S. at 484, the PMPA is exclusively the creation of the federal government, and is intended to supplant all inconsistent state law. *See, e.g., In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986). While numerous States had previously adopted laws designed to address problems in the petroleum franchisor-franchisee relationship, none of those statutes were equivalent to the PMPA in its attempt to provide clear and definitive guidelines. Senate Report at 877. The PMPA is a uniquely *federal* statute and one under which their prior experience and expertise benefits the lower federal courts.[18]

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[17] Where a statutory right may depend on judicial development for its content, "the danger of legal chaos will vary directly with the number of courts independently interpreting the right." M. Redish & J. Muench, *Adjudication Of Federal Causes Of Action In State Court*, 75 Mich. L. Rev. 311, 332 (1976). This is an important consideration in light of the importance Congress expressly attached to uniformity in the PMPA. As noted by the commentators quoted above, "the likelihood of varying interpretations of federal law . . . is substantially reduced when only federal courts are making the interpretations." *Id.* at 332 n.88.

[18] In its study of the division of responsibility between state and federal courts, the American Law Institute concluded that state judges are less exposed to the intricacies of federal substantive law, and that federal judges have developed "an expertness in deal-

Indeed, the principal author of the PMPA, Congressman Dinglell, spoke directly to the intended role of the federal courts in cases under the PMPA:

> The *key to this legislation* is the balance which is struck by including flexibility in the grounds which justify termination of nonrenewal and simultaneously requiring the franchisor prove to an impartial arbiter, *a Federal court judge*, that permissible grounds for termination or nonrenewal do in fact exist. Franchisee rights under this bill are, as a result, more meaningful than limitations on franchisor conduct, provided in some State laws, which are arguably more stringent. . . .

123 Cong. Rec. 10383 (April 5, 1977) (emphasis added). The quoted statement is a clear declaration of the benefits the PMPA's sponsors believed would flow from having *federal courts* decide issues under the PMPA, in contrast to the existing system in which state court judges applied state laws which were "arguably more stringent." [19]

In considering the "federal court expertise" prong of the *Gulf Offshore* analysis, the fact that the PMPA expressly mandates the application of *federal* procedural

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ing with questions of federal law that comes from more extended contact with such questions . . . ." American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Court* 166-67 (1969).

[19] The legislative history of the PMPA is thus materially different from OCSLA's legislative history. *Gulf Offshore*, 453 U.S. at 482-483. As the Ninth Circuit stated in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 436 (9th Cir. 1984), *op'n amended on denial of reh'g*, 815 F.2d 570 (9th Cir. 1987), "the absence of reference to the state courts combined with Congress's affirmative references to the federal courts suggests an intent to make federal jurisdiction exclusive." Although the legislative history sometimes refers, generically, to "the courts," petitioners are unable to cite even a single instance in which the legislative history expressly or implicitly contemplates *state court* jurisdiction. (Pet. at 22.) Petitioners' assertion that these statutory directives are "merely . . . guidelines" (Pet. at 24) is contradicted by the mandatory language of those statutory provisions.

rules is also a material factor that supports exclusive jurisdiction.[20] *See Hathorn*, 457 U.S. at 267 (reference in the Voting Rights Act to the three-judge court procedure under 28 U.S.C. § 2284); *see also Valenzuela*, 789 F.2d at 436 (Title VII requires application of Fed. R. Civ. P. 65). Even if Congress has the power to mandate state court application of the Federal Rules of Civil Procedure,[21] federal judges plainly have greater expertise in applying those Rules than do state court judges. Under *Gulf Offshore*, this important factor strongly supports the finding of exclusive federal court jurisdiction.

C. The Federal Courts Are More Hospitable to the Delicate Balance of Competing Interests Which Congress Attempted to Strike In the PMPA.

The third factor to be considered under the *Gulf Offshore* analysis is whether federal courts would be more "hospitable" than state courts to peculiarly federal claims. *Gulf Offshore*, 453 U.S. at 484. As noted above, the PMPA is a uniquely federal statute; no other state law is similar to the PMPA in terms of its detailed delineation of permissible versus impermissible grounds for termination or nonrenewal. Moreover, while many state statutes were "arguably more stringent," the PMPA was intended to strike a "delicate balance" between meaningful protections to franchisees and needed flexibility to franchisors. *Brach v. Amoco Oil Co.*, 677 F.2d 1218, 1220 (7th Cir. 1982); Senate Report at 877.

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[20] Section 2805(d) of the PMPA (15 U.S.C. § 2805(d)) provides that, if a franchisee prevails in an action under the PMPA, he may be entitled to actual damages "consistent with the Federal Rules of Civil Procedure . . . ." Section 2805(b)(2) of the PMPA imposes detailed standards to be applied to motions for a preliminary injunction which "embraced a judicial standard utilized by the Second Circuit." Senate Report at 899.

[21] In *Valenzuela*, the Ninth Circuit expressly questioned whether Congress has the power to mandate state court application of federal procedural rules. *Valenzuela*, 739 F.2d at 436.

Where, as here, federal law is being used to supplant an existing body of state law, it is likely that federal court judges will enforce the law in a way that is more faithful to federal policy than to the displaced state policy.[22] Since the PMPA contains elements that were not explicitly embodied in any existing state statutes, the need for interpretations that will be fully sympathetic to the entire mix of federal concerns is especially evident under the PMPA.

Contrariwise, the potential for *in*hospitable treatment by state courts is vividly illustrated in the case at bench. Here, the state court judge expressed the opinion that the PMPA is "lousy legislation." The state court judge also invidiously remarked that the PMPA is "a classic example of the kind of legislation that we get out of the Congress . . . ." Those statements explicitly suggested that the PMPA's detailed provisions were only the result of "self-perpetuation" by elected federal representatives and industry lobbysists. The state court judge's bottom line is that the PMPA is "a poorly drafted federal statute that is very hard to understand."

While the hostility to federal legislation reflected by such remarks is not necessarily characteristic of state court judges as a class, such attitudes are much less likely to be prevalent within the *federal* system.[23] The role

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[22] As one commentator has noted, "A third factor militating for exclusive federal jurisdiction is the probability that the federal courts will be more sympathetic to a new federal statute than will the state courts, *especially when the matter involved is controversial and the national policy is likely to be accepted with reluctance by certain groups.*" Note, *Exclusive Jurisdiction of the Federal Courts In Private Civil Actions*, 70 Harv. L. Rev. 509, 512 (1957) (footnote omitted; emphasis added).

[23] For example, the Ninth Circuit in rejecting a franchisee's claim under a parallel provision of the PMPA for a "first refusal" purchase option noted that "Congress here seems to have known precisely what it was doing." *Valentine v. Mobil Oil Corp.*, 789 F.2d at 1391.

Congress intended for the PMPA in a national policy relating to motor fuel distribution requires a faithful and evenhanded application, and strongly supports exclusive federal jurisdiction over PMPA claims.

For the reasons stated above, the petition for a writ of certiorari should be denied with respect to the first "Question Presented" set forth therein.

III. THE DISTRICT COURT'S REMAND ORDER DID NOT PRECLUDE THE COURT BELOW FROM DETERMINING THAT ITS EXERCISE OF SUBJECT MATTER JURISDICTION WOULD BE CONTRARY TO CONTROLLING FEDERAL LAW.

As the second "Question Presented," petitioners assert that the decision by the court below constituted a prohibited "review" of the district court's remand order, even though petitioners acknowledge that the court below did *not* reverse, vacate or modify that remand order. (Pet. at 25.) Petitioners' theory is that the decision below indirectly reviewed the remand order by substituting the opinion of the court below as to the proper jurisdictional forum. (*Id.*) However, petitioners' theory is contradicted by applicable Supreme Court authority and by the facts of this case.

In *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court held that a decision to remand an action to state court, after removal, "had no relevance to [to the state court's] inquiry into whether the pre-emption doctrine barred the state courts from exercising their jurisdiction." *Id.* at 315 n.5. Although the state court in that case concluded that it could exercise jurisdiction over a shipper's claim against a railroad, the Court held that the shipper's action was subject to the exclusive jurisdiction of the Interstate Commerce Commission. *Id.* at 323, 331-332. Thus, the district court's remand order in that case did not constitute the last word on the subject of the proper

forum for the litigation, and the state court's judgment was instead reversed since the court had assumed a jurisdiction that was precluded by federal law. *Id.*

By contrast, none of the cases cited by petitioners involved issues of exclusive federal jurisdiction.[24] Neither this Court nor any other court has ever held that a district court may confer state court jurisdiction to hear where Congress has expressly or implicitly decided to limit jurisdiction to the federal courts. While 28 U.S.C. Section 1447(d) provides that "[a]n order remanding to state court . . . is not reviewable . . . ," a state court's inquiry into its own jurisdiction does not constitute such a prohibited review. Since the rule against appellate review of remand orders does not mean that they are free from error, *see, e.g., Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723, *reh'g denied*, 431 U.S. 975 (1977), intractable problems would be created if state courts were compelled to adhere consistently to a flawed analysis of the facts or law in the case, merely because a district court expressed erroneous views in its remand decision. The only reasonable interpretation of Section 1447(d) is simply that *the remand order itself* cannot be reversed, vacated or modified by any other court, but state courts have the same jurisdiction as they did before removal to consider their own jurisdiction, or to decide

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[24] The only two cases cited by petitioners as direct authority are *Missouri Pac. Ry. v. Fitzgerald*, 160 U.S. 556 (1896), and *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). (Pet. at 26-27.) Neither case involved an issue of exclusive federal jurisdiction. In *Fitzgerald*, this Court rejected a contention that the state courts lacked jurisdiction, but that contention was asserted *solely* on the ground that the federal court improperly remanded the claim on diversity grounds. Moreover, *Rath Packing rejected* a claim that the district court's remand order prevented the defendant from securing a federal forum by way of a declaratory relief action. 530 F.2d at 1303, 1305-06.

any factual and legal issues fairly presented by the case.[25] This Court recognized that principle in treating the remand order as "irrelevant" to the issue of state court jurisdiction in *Kalo Brick*, 450 U.S. at 315.

Petitioners also fail to present any reason to find that the second question presented is certworthy in any way, and the purported issue is lacking in sufficient significance to warrant review by this Court. The alleged issue is inextricably intertwined with the unique procedural history of this case, and is not one of general importance or one that is subject to any significant disagreement. Moreover, there is simply no reason for this Court to accept petitioners' invitation to broaden the scope of Section 1447(d) beyond anything contemplated by existing law, and the expanded rule sought by petitioners would create irreconcilable conflicts with existing law and federal policies relating to the exclusive or primary jurisdiction of federal courts and administrative agencies.

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[25] In this case, the district court's opinion did not even address the question of exclusive jurisdiction. Rather, the court felt that it could not acquire removal jurisdiction over a PMPA case which included a "non-franchisor" defendant. (Pet. App. 13-14, 22.) In that regard, the district court's decision is at odds with this Court's recent decision in *Carnegie-Mellon University v. Cohill*, —— U.S. ——, 108 S. Ct. 614 (1988), which held that pendent claims may be remanded "when *all* federal-law claims in the action have been *eliminated* . . . ." *Id.* at 616 (emphasis added). The dissenting opinion in *Carnegie-Mellon* expressed the view that a remand would not even be statutorily authorized under those circumstances. *Id.* at 623-24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD C. SMALTZ
(Counsel of Record)
LEIGHTON M. ANDERSON
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Twenty-First Floor
Los Angeles, California 90017
Telephone: (213) 612-2500
Attorneys for Respondent
Thrifty Oil Co.

DATED: November 18, 1988

APPENDIX

APPENDIX

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. 377024

Consolidated with Case Nos.:

399 330	406 857
406 851	406 858
406 852	407 545
406 853	409 749
406 854	410 941
406 855	410 942
406 856	

JACK ABADJIAN, *et al.*,
Plaintiffs,

v.

GULF OIL CORPORATION,
a Pennsylvania corporation, *et al.*,
Defendants.

And Related Counterclaims, Cross-Claims
and Consolidated Actions

[Filed Jan. 16, 1986]

JUDGMENT

The First Cause of Action of the Complaint herein for declaratory relief having been severed for separate trial to the Court without a jury; and the parties, in light of the Court's Memorandum Ruling of December 10, 1984, having stipulated to all facts material to that cause of action;

NOW, THEREFORE, it is adjudged and declared as follows:

1. The September 30, 1980 Agreement between defendant Gulf Oil Corporation ("Gulf") and defendant Thrifty Oil Company ("Thrifty") was an event and an action that gave to each plaintiff a right of first refusal to purchase Gulf's interest in the leased premises occupied by the respective plaintiffs.

2. The first refusal price which each dealer is entitled to receive from Gulf as of November 30, 1985, calculated in accordance with the formula stipulated to by the parties in their December 5, 1985 "Stipulation or Facts" is as follows:

Fee Properties	Service Station No.	First Refusal Price
Ball	1712	$ 82,475.00
Brown	724	$146,370.00
Eghenian	769	$198,488.00
Mazarei	1284	$304,711.00
Prouse	581	$101,599.00
Rosenstein	1099	$212,231.00
Shishmanian	392	$414,014.00
Smiderle	968	$ 45,922.00
Leaseholds		
Abadjian	1311	$ 3,629.00
Ceson	334	$ 32,107.00
May	321	$ 57,718.00
Webber	316	$–10,838.00

3. Each plaintiff must exercise his right of first refusal within forty-five (45) days of the date that the judgment herein becomes final. The right of first refusal must be exercised by depositing the first refusal price, calculated in accordance with the formula stipulated to by the parties in the December 11, 1985 "Stipulation of Facts," in an escrow to be established by Gulf with instructions that the first refusal price is to be transferred to Gulf upon delivery to the plaintiff of an appropriate deed or other conveyance transferring Gulf's interest in the leased premises of the respective plaintiffs to each plaintiff depositing the amount of the first refusal price.

4. The monthly rent which each plaintiff is obligated to pay Gulf and the unpaid rent which has accrued as of November 30, 1985, plus interest thereon at 7% per annum, are as follows:

Plaintiff	Monthly Rental	Accrued Rent As Of 11/30/85 With Interest At 7%
Abadjian	$1,083.00	$22,984.00
Ball	2,346.00	34,276.00
Brown	2,126.00	50,588.00
Ceson	2,757.00	43,327.00
Eghenian	2,636.00	21,033.00
May	1,561.81	53,150.00
Mazarei	2,674.00	75,272.00
Prouse	2,051.00	21,165.00
Rosenstein	1,221.00	16,519.00
Shishmanian	2,743.00	99,744.00
Smiderle	1,370.00	4,413.00
Webber	2,348.67 (plus gallonage rent of 1¢ per gallon over 65,000 gallons)	76,951.00

5. Each of the plaintiffs is occupying the service station property he leased from Gulf under the terms of an expired lease. Any plaintiff not exercising the right of

first refusal hereinabove provided for is obligated to vacate the leased premises immediately after the right of first refusal granted by Gulf has expired, and each plaintiff shall be obligated at the time the first refusal right expires without having been exercised to pay Gulf the amount of accrued rent and unpaid interest thereon at 7% per annum.

6. This Court shall retain on-going and continuing jurisdiction to determine the first refusal prices at which Gulf must make offers to the plaintiffs when the judgment herein becomes final. Such final first refusal prices shall be determined by the Court in accordance with the formula stipulated to by the parties in their December 11, 1985 "Stipulation of Facts."

7. This judgment resolves the conflicting claims of plaintiffs and Thrifty in properties owned by Gulf. For this reason, prejudice to the parties can be avoided only by speedy resolution of any appeal of this judgment. Accordingly, this Court respectfully requests that any appeal be handled by the Court of Appeal on an expedited basis.

Dated: Jan 15, 1986 /s/ Ronald E. Swearinger
RONALD E. SWEARINGER
Judge
Los Angeles County
Superior Court

No. 88-674

(3)

Supreme Court, U.S.
FILED
NOV 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

JACK ABADJIAN, MARK BALL, JOSEPH BROWN, JOHN EGHENIAN, BRAD MAY, NASSIR MAZAREI, DONALD PROUSE, AL ROSENSTEIN, ARAM SHISHMANIAN, JOE SMIDERLE and STEPHEN WEBBER,
Petitioners,

VS.

GULF OIL CORPORATION,
a Pennsylvania corporation,
THRIFTY OIL CORPORATION,
a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Two

RESPONDENT GULF OIL CORPORATION'S BRIEF IN OPPOSITION

JACK D. FUDGE
Counsel Of Record
RALPH ZAREFSKY
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys For Respondent Gulf Oil Corporation

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

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No. 88-674

In the Supreme Court

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a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Two

RESPONDENT GULF OIL CORPORATION'S BRIEF IN OPPOSITION

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The Petition does not warrant review by this Court. In an unpublished opinion, an intermediate California appellate court, adopting the rationale of a California federal

[1]Subsequent to the filing of this action, Respondent Gulf Oil Corporation was merged into Chevron U.S.A., Inc., a subsidiary of

district court and another intermediate California court, correctly determined that claims arising under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801 *et seq.*, lie within the exclusive jurisdiction of the federal courts.

In addition, the fact that a federal district court had earlier remanded the case to state court has no bearing on the determination of the California appellate court. Orders of federal district courts have no binding stare decisis effect on state courts. Moreover, the remand order did not consider the jurisdictional issue addressed by the California intermediate appellate court.

JURISDICTION

Respondent Gulf agrees that the Petition was timely filed. This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

In September 1980, Gulf agreed to sell its interest in approximately two hundred (200) service stations to Thrifty Oil Co. ("Thrifty"), subject to the service station dealers' rights under the PMPA. Included among those properties were service stations occupied and operated by petitioners.

Petitioners filed suit on August 13, 1981, seeking, *inter alia,* a determination of their PMPA rights.

Because it appeared from their complaint that petitioners claimed *directly* under the PMPA, a federal statute, Gulf and Thrifty removed the action to federal court. In

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Chevron Corporation. Corporate subsidiaries and affiliates of Chevron are set forth in Appendix A.

seeking remand, counsel for petitioners expressly represented to the federal court that "we have not purported to allege a cause of action under the Petroleum Marketing Practices Act." The case was subsequently remanded to state court.

In late 1983, petitioners filed a motion for summary adjudication of issues "under PMPA." This prompted Gulf and Thrifty to remove the case again since petitioners, in their moving papers, sought summary adjudication of rights under the PMPA rather than a declaration of rights under state law, which was what petitioners previously had maintained they were seeking. The case was again remanded to the California Superior Court for the County of Los Angeles. *See, Abadjian v. Gulf Oil Corp.*, 602 F.Supp. 874 (C.D.Cal. 1984).

Petitioners' PMPA claims thereafter were tried to the court on stipulated facts. Judgment was entered granting petitioners rights of first refusal to purchase Gulf's interest in petitioners' respective service stations. Gulf and Thrifty appealed from that judgment.

On May 8, 1988, the California Court Of Appeal, Second Appellate District, reversed the trial court's judgment on the ground that federal courts have exclusive jurisdiction over PMPA claims and, therefore, the trial court lacked jurisdiction to resolve disputes arising under the PMPA. The California Supreme Court summarily denied review on July 20, 1988. Petitioners timely filed their Petition For Certiorari in this Court.

REASONS FOR DENYING THE WRIT

I.

THE PETITION PRESENTS NO CONFLICT AMONG STATE COURTS OF LAST RESORT, NOR AN IMPORTANT ISSUE OF LAW, CONCERNING THE EXCLUSIVE JURISDICTION UNDER THE PETROLEUM MARKETING PRACTICES ACT

Rule 17.1(b) of the U.S. Supreme Court Rules provides that certiorari may be proper "when a state court *of last resort* has decided a federal question in a way which conflicts with the decision of another state court *of last resort* or of a federal *court of appeals.*" (Emphasis added.) This rule reflects the importance of allowing the highest courts of the land to develop the law and define areas of conflict (if any) before this Court, as a final arbiter, exercises its jurisdiction. *See,* 13 J. MOORE, MOORE'S FEDERAL PRACTICE, § 817.21 (2d ed. 1988).

Section 2805(a) of PMPA provides that an action by a franchisee against a franchisor "may be brought . . . in the district court of the United States . . . ." 15 U.S.C. § 2805(a). Whether this statute confers concurrent jurisdiction has not been addressed by a "state court of last resort," in this case or any other. Nor has the issue been addressed by a single "federal court of appeals."

Similarly, the requirements of Rule 17.1(c) have not been met because no "important question of federal law" is presented by this case. In the ten years since the PMPA was enacted, only a handful of courts have considered whether PMPA jurisdiction is exclusively federal or concurrent. No state court of last resort and no federal circuit court have considered the issue. The absence of such review by federal circuit courts and state courts of

last resort evidences that an "important question of federal law" has not been raised.

Moreover, the statute clearly *does* establish exclusive federal jurisdiction. In *Ted's Tire Service, Inc. v. Chevron U.S.A., Inc.*, 470 F.Supp. 163, 165 (D. Conn. 1979), the court summarily concluded that Congress intended concurrent state jurisdiction under Section 2805(a), because that section does not say an action "*must* be instituted in federal court." However, *Ted's Tire Service* made no reference to other language in the PMPA or its legislative history. The only other federal case interpreting Section 2805(a), *Rustom v. Atlantic Richfield Co.*, 618 F.Supp. 210 (C.D.Cal. 1985), did thoroughly analyze the question of PMPA jurisdiction, rejecting *Ted's Tire Service* as unpersuasive. 618 F.Supp. at 212. The *Rustom* court concluded that while there is a presumption of concurrent jurisdiction, that presumption may be rebutted:

> In *Gulf Offshore,* the Court held that there is a presumption that a state court has concurrent jurisdiction over actions arising under a federal statute .... However, that presumption may be rebutted "by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests."
>
> 618 F.Supp. at 212.

Rustom has been consistently followed in both state and federal courts in California. *See, Elimelekh v. Texaco Refining & Marketing, Inc.*, Bus. Fran. Guide (CCH ¶ 8663 at 16,751 (C.D.Cal. 1986)); *Eckel v. Atlantic Richfield Co.*, No. CV85-8451 (AHS), slip op. (C.D.Cal. 1986); *Niakan v. Samaan,* 199 Cal.App.3d 716, 719, 245 Cal.Rptr. 24 (1988); *but see, California ARCO Distrib., Inc. v. Atlantic Richfield Co.,* 158 Cal.App.3d 349, 364, 204 Cal.Rptr. 743

(1984) (a case decided before *Rustom,* which endorsed, without analysis, the holding in *Ted's Tire Service*), and *Johnson v. Mobil Oil Corp.,* 528 A.2d 155 (Pa. Super. 1987) (citing but refusing to follow *Rustom*). This Court has recently denied review of the very issue presented here, *Kreisher v. Mobil Oil Corp.,* No. 88-195, *cert. denied* 57 U.S.L.W. 3260 (U.S. October 11, 1988).

This Court's decision in *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473 (1981), provides the appropriate guidelines for determining the exclusive/concurrent jurisdiction issue: concurrent jurisdiction over actions arising under a federal statute is presumed (*Id.* at 478); but that presumption may be rebutted "by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests." *Id.*

The language of the PMPA clearly indicates that Congress intended exclusive federal jurisdiction. After providing that a PMPA action "may be brought . . . in [a federal] district court . . . " in Section 2805(a), Congress then provided for damages which are " . . . consistent with the Federal Rules of Civil Procedure . . . ," and application of Rule 65 standards for issuance of injunctions. 15 U.S.C. §§ 2805(d)(1)(A), 2805(h)(2). Reference to federal rules provides a clear implication of exclusive jurisdiction, which is confirmed as well by the legislative history for PMPA.

Both the Senate and House Reports on the legislation state that "the provisions of Title I are enforceable by private civil action in U.S. District Court." S.REP. No. 95-731, 95th Cong. 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 874; H.R. REP. No. 95-161, 95th Cong. 1st Sess. 14 (1978). *See also, Rustom,* 618 F.Supp. at 212; *Niakan,* 199 Cal.App.3d at 720. Absolutely nothing

was said about concurrent jurisdiction of state courts, nor is there any language in the legislative history from which such jurisdiction could be inferred. The conspicuous absence of congressional reference to concurrent state court jurisdiction was noted by the court in *Rustom:*

> Although not determinative, the absence of reference to the state courts combined with Congress' affirmative references to the federal courts suggests an intent to make federal jurisdiction exclusive.
>
> 739 F.2d at 436.

Thus, both the statutory language and legislative history make implicit Congress' intent that federal courts have exclusive jurisdiction of claims under the PMPA.

II.

THE PETITION PRESENTS NO REVIEWABLE ISSUE CONCERNING REMAND ORDERS

Petitioners' argument that remand orders issued pursuant to 28 U.S.C. Section 1447(d) are not appealable is misguided, and provides no basis for issuance of certiorari. First, the California Court of Appeal did not review or purport to review the remand order. Second, the remand order did not address the issue of exclusive jurisdiction ruled upon by the California Court of Appeal. Third, petitioners' argument wrongly assumes that decisions of a federal district court function as law of the case in subsequent state court proceedings. The law is to the contrary. As noted in 1B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 0.402[1] (2d ed. 1987):

> In matters of federal law, of course, all the state courts owe obedience to the decisions of the Supreme Court of the United States, but the *decisions of the*

> *court of appeals in the circuit embracing the state, or those in the district court of the district in which the trial takes place,* do not govern under the doctrine of stare decisis.
>
> (Emphasis added.)

Consistent with this general proposition, the courts of the State of California have specifically held that a remand decision of a federal district court does not operate as law of the case. *Provience v. Valley Clerks Trust Fund,* 169 Cal.App.3d 249, 256, 209 Cal.Rptr. 276, 279 (1984); *California ARCO Distributors, Inc. v. Atlantic Richfield Co.,* 158 Cal.App.3d 349, 364 n. 9, 204 Cal.Rptr. 743, 754 n. 9 (1984).

As the courts in California, as well as federal courts acknowledge, a court always has the power to determine whether it lacks jurisdiction at any stage of the proceeding. *See, e.g., Ilan-Gat Engineers, Ltd. v. Antigua International Bank,* 659 F.2d 234, 239 (D.C. Cir. 1981); *Jacobs v. Retail Clerks Union, Local 1222,* 49 Cal.App.3d 959, 963, 123 Cal.Rptr. 309, 312 (1975). The remand order on which petitioners seek to rely did not prevent the courts of the State of California from concluding, on the record there presented, that exclusive jurisdiction lay in the federal courts.

CONCLUSION

For the reasons stated, the Petition should be denied.

Dated: November 16, 1988

Respectfully submitted,

JACK D. FUDGE
Counsel Of Record
RALPH ZAREFSKY
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Attorneys For Respondent Gulf Oil Corporation

APPENDIX A

SUBSIDIARIES AND AFFILIATES OF CHEVRON CORPORATION

American Gilsonite Company
American Overseas Petroleum Limited
  American Overseas Petroleum (Spain) Limited
Arabian Chevron Overseas Limited
Arabian Chevron, Inc.

California (Nigeria), Incorporated
  Chevron Oil Company (Nigeria)
California Asiatic Oil Company
  Chevron Darajat Limited
  Chevron Jambi Inc.
  Chevron Langsa Inc.
  Chevron Natuna Inc.
  Chevron Nauka Inc.
  Chevron Oil Company (Nigeria)
  Chevron Oil Company of Spain
  Gulf Oil Zaire S.A.R.L.
Caltex Petroleum Corporation
Chevron Do Brasil Participacoes
  e Empreendimentos Ltda.
Chevron Amazon Petroleum Company
Chevron Australia Transport Pty., Ltd.
  Northwest Shelf Shipping Service
    Company Pty. Ltd.
Chevron Bahia Petroleum Company
Chevron Bahia Sub Petroleum Company
Chevron Canada Limited
  Chevron Canada Resources Limited
    Cansulex Limited
    Chevron Development Company Limited
    Glen Park Gas Pipeline Company Limited

Rimbey Pipe Line Co. Ltd.
Sultran Ltd.
Chevron Minerals Ltd.
Cornwallis Arctic Oils Limited
Furnace Oil Sales Ltd.
Irving Oil Company, Limited
Irving Oil Limited
Canaport Limited
Irving California Oil Company Ltd.
Irving Oil Terminals Ltd.
Irving Oil Limited
Canaport Limited
Irving California Oil Company Ltd.
Irving Oil Terminals Ltd.
Standard Oil Company of British Columbia (1981) Limited
Chevron Chemical Company
Aditivos Mexicanos, S.A. de C.V.
BGD Company
Chevron Do Brasil Ltda.
Chevron Chemical (Canada) Limited
Later Chemicals Limited
Chevron Chemical (Far East) Private Limited
Chevron Chemical (FSC)
Chevron Chemical Company, S.A.F.
Deutsche Ortho G.M.B.H.
Chevron Chemical International Sales, Inc.
Orogil, S.A.
Chevron Chemical International, Inc.
Chevron Chemical, S.A.
Chevron Chemical G.M.B.H.
Chevron International Chemicals Ltd.
Coromandel Fertilizers Limited
Insecticidas Ortho, S.A.

Internacional De Basicos y Quimicos, S.A. de C.V.
Karonite Chemical Company, Limited
Nippon Petroleum Detergent Company, Limited
Orogil, S.A.
Petrosynthese, S.A.
Plastigama S.A.
Quimicas Ortho de California, Limitada
Spirolite Corporation
Sugar Creek Terminals, Inc.
Valent U.S.A. Corporation
Chevron Coal Development Company
Chevron Environmental Health Center, Inc.
Chevron Exploration Corporation
Chevron Exploration Corporation of Chile
Chevron Exploration Corporation of Sudan
Chevron Foreign Service Corporation
Chevron Guaratuba Petroleum Company
Chevron Iguape Petroleum Company
Chevron Indonesia Oil Company
Chevron Industries, Inc.
Chevron Mineral Corporation of Ireland
Compania Minera Chevron Dominicana, S.A.
Chevron International Oil Company, Inc.
Aircraft Fuel Supply B.V.
Chevron Belgium Refining
Chevron Erodel Mandels-GHBH
Caltex Deutschland G.M.B.H.
Mineraloel-Additives Vertriebsgesellschaft M.B.H.
Chevron Functional Fluids, Inc.
Chevron International Services, Inc.
Chevron International Trading Company — West Africa
Chevron Italiana Marina Aviazione S.P.A.

Mars-Milan Airport Refuelling Services S.P.A.
Seram — S.P.A.
Chevron Oil (Switzerland)
Mittelland Refinery Limited
Saraco S.A.
Tar-Tankanlage Ruehlang A.G.
Ubag-Unterflurbetankungsahlage Flughafen Zurich
Chevron Oil Latin America, Inc.
Chevron Oil Trading Company
Compania Minera Chevron Dominicana, S.A.
Maasylakte Olte Terminal N.Y.
Sunset Oil Trading Limited
Chevron Investment Management Company
Chevron Itajai Petroleum Company
Chevron Land and Development Copany
C-H Properties, Inc.
Glenwood Properties
Ontario Center, The
Pacific Coast Homes
Sepulveda Properties, Inc.
Chevron Maranhad Petroleum Company
Chevron Mineral Corporation of Ireland
Chevron Natural Gas Services, Inc.
Chevron Nile Services Limited
Chevron Oil & Chemical Company Pty. Ltd.
Chevron Oil and Chemical Company Limited
Chevron Oil and Chemical Company Oy
Chevron Oil Company of Central African Republic
Chevron Oil Company of Chad
Societe D'Etude et D'Exploitation de la Raffinerie du Tch
Chevron Oil Company of Egypt

Chevron Oil Company of Gabon
Chevron Oil Company of Germany
Chevron Oil Company of India
Chevron Oil Company of Ireland
Chevron Oil Company of Italy S.P.A.
Chevron Oil Company of Japan
Chevron Oil Company of Korea
Chevron Oil Company of Niger
Chevron Oil Company of Portugal
Chevron Oil Company of Senegal
Chevron Oil Company of Sudan
Chevron Oil Company of Syria
Chevron Oil Company of the Gambia
Chevron Oil Company of the Philippines
Chevron Oil Company of Uruguay
Chevron Oil Company of Yugoslavia (Jabuka)
Chevron Oil Company of Yugoslavia (Hljet)
Chevron Oil Exploration Company of Greece
Chevron Oil Field Research Company
Chevron Orient, Inc.
Chevron Overseas Company
Chevron Overseas Finance Company
  Chevron Oil Company of Venezuela
    Tierras e Inversiones Venezuela, C.A.
  Compania Petrolera Chevron, Ltd.
Chevron Overseas Petroleum Inc.
  Gulf Oil Zaire S.A.P.L.
Chevron Petroleum Company of Brazil
Chevron Petroleum Company of Colombia
Chevron Petroleum Company of Norway
Chevron Pipe Line Company
  Canyon Reef Carriers, Inc.
  Chandeleur Pipe Line Company
  Chevron Alaska Pipe Line Company
  Chevron Raven Ridge Pipe Line Company

- Dixie Pipeline Company
- Explorer Pipeline Company
- Kenai Pipe Line Company
- Mid-Valley Pipeline Company
- Paloma Pipe Line Company
- Plantation Pipe Line Company
- Platte Pipe Line Company
- Standard Gas Company
- Standard Pacific Gas Line Incorporated
- Standard Pipe Line Company
- West Texas Gulf Pipe Line Company

Chevron Porto Belo Petroleum Company

Chevron Research Company

- B.V. Chevron Centrale Laboratoria
- Chevron do Brasil Ltda.
- Chevron Research Company (Japan) Ltd.
- Compania Minera Chevron Dominicana, S.A.

Chevron Sao Luis Petroleum Company

Chevron Sao Marcos Petroleum Company

Chevron Shale Oil Company

Chevron Shipping Company

Chevron Solemar Petroleum Company

Chevron Standard Limited

- Chevron Canada Resources Limited
  - Cansulex Limited
  - Chevron Development Company Limited
- Glen Park Gas Pipeline Company Limited
- Rimbey Pipe Line Co. Ltd.
- Sultran Ltd.

Chevron Stations, Inc.

Chevron Tankers (Nederland) B.V.

Chevron Telecommunications Company

Chevron U.S.A. Inc.

- American Personnel Services, Inc.
- Atlas Supply Company

Bolivian Gulf Oil Company
California Company, The
Chevron Capital U.S.A. Inc.
Chevron Geothermal Company of California
Chevron Oil Finance Company
Chevron Petroleum Company of The Netherlands
Chevron Travel Club, Inc.
Chevron Travel Club Services Company
Federal Engineering Corporation
Felix Oil Company
Gulf Auto Club, Inc.
Gulf Oil Communications Company, Inc.
Gulf Oil Realty Company
Gulf Reston Properties, Inc.
GOC Acquisition Corporation
Intermountain Geothermal Company
International Bitumen Emulsions Corporation
Kewanee Industries, Inc.
Kewanee Overseas Oil Company
Netherlands Kewanee, Inc.
Lost Hills Water Company
Murvale Company
Pembroke Capital Company Inc.
Petroleum Facilities, Inc.
Standard Gasoline Company
Standard Oil Company
Standard Oil Company of Texas, Inc.
Transocean Group, Inc.
Transinsco, Inc.
Warren Petroleum, Inc.
Western States Geothermal Company
Chevron Ubatuba Petroleum Company
Chevron Venezuela Services Inc.
Compania de Petroleo Chevron S.A.

Compania Comercial California S.A.
Compania Comercial Conchan S.A.
Compania Minera Chevron de Espana, S.A.
Compania Minera Chevron Dominicana, S.A.
Compania Minera Chevron, Inc.
Compania Petrolera Chevron
Compania Petrolera Chevron Nicaragua
Cornwallis Arctic Oils Limited
Crest Exploration Limited

Far Eastern Petroleum Company Limited
  Chevron Overseas Petroleum Limited
    Borco Towing Company Limited
    Freeport Trading Company Limited
    Marine Agents and Brokers Limited
    Overseas Petroleum Company Limited
      Borco Towing Company Limited
      Freeport Trading Company Limited
      Marine Agents and Brokers Limited
    River Nile Petroleum Company Limited
    White Nile Petroleum Company Limited

Gulf Oil Corporation

Huntington Beach Company
  Huntington Pacific Corporation
  Huntington Seacliff Corporation
  Mansion Properties, Inc.

Iran Chevron Oil Company
  Iranian Oil Participants Limited
  Iranian Oil Services (Holdings) Limited

Kelmac, Inc.
  Ukamar Limited

Ocean Facilities, Inc.
  Ocean Charters, Inc.

Oil Insurance Limited
Oil Investment Corporation Ltd.
Oil Investment Corportion Ltd.
P. T. Caltex Pacific Indonesia
Pacific Oil Company
Petroleum Buildings, Inc.
Pittsburg & Midhay Coal Mining Co., The
Solvent Refined Coal International, Inc.
Powell Bend Mining Co.
Refineria Petrolera de
Guatemala-California, Inc.
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company
Standard Oil Company of California
Standard Oil Company of Delaware
Standard Oil Company, Inc.
Standard Oil Company, Ltd.
Standard Oil Company Sales Co., Inc.
Transocean Chevron Company
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Trans-Arabian Pipe Line Company
Associated Octel Company Limited, The
A.K. Chenie G.H.B.H.
Associated Octel Company (Plant) Limited
Associated Octel Company
(South Africa) (Proprietary) L

Octel Societe Anonyme
Societa Italiana Additivi Per
Carbu'ranti SPA is. I.A.C.
Societe Octel-Kuhlemann
Australian Gulf Oil Company
Bermaco Insurance Company Limited
Insco Limited
Britamco Limited
Cabinda Gulf Oil Company
Cabinda Gulf Oil Company Limited
Chevron (U.K.) Offshore Investments Limited
Chevron Oil (TNS) Limited
Chevron Oil (TOGH) Limited
Chevron Oil (TOI) Limited
Chevron Oil (TOI) Limited
Chevron Oil (TNS) Limited
Chevron U.K. Offshore Exploration Company Limited
Chevron Capital N.V.
Chevron Caribbean Investments Inc.
Chevron Chemical (Hong Kong) Limited
Chevron Germany Inc.
Chevron International Limited
Cayman Kewanee Limited
Chevron Barreirinhas Exploration Limited
Chevron Servicos de Petroleo LTDA.
Chevron International (Argentina) Limited
Chevron International (Malaysia) Limited
Chevron International Italy Limited
Chevron International Somalia Limited
Chevron International Yugoslavia Limited
Chevron UNG Shipping Company Limited
International Gas Transportation Company Limited
Chevron Niugini Pty. Limited

Chevron Transport Corporation
Chevron Product Carriers Corporation
Chevron Tankers (Bermuda) Limited
Gulf Musandam Petroleum, Limited
Gulf Oil (Ireland) Limited
Gulf Oil of Colombia Limited
Gulf Oil Australia Pty. Ltd.
Gulf Oil Egypt Limited
Gulf Oil Pakistan Limited
Gulf Oil Ras Al-Khaimah Limited
Gulf Oil Shadwan Limited
Gulf Oil Suez Limited
Gulf Oil Terminals (Ireland) Limited
Britama Tankers Limited
Gulf Oman Petroleum Limited
Kupan International Company Pension Plan
Trustees Limited
Natuna Gulf Oil Limited
Sumatra Gulf Oil, Limited
Tunisian Gulf Exploration and
Production Company
Chevron Italia Oil Company S.P.A.
Chevron Marine And Services Company Limited
Chevron Oil and Chemical Company AB
Chevron Oil Company of the Netherlands
Gulf Oil (Nederland) Exploration and
Production Company
Chevron Oil Service Company
Chevron International Oil Company Limited
Chevron Oil (Ireland) Limited
Chevron Petroleum (U.K.) Limited
British Kewanee, Inc.
Kewanee Oil Company (U.K.) Limited
Chevron Exploration North Sea Limited
Chevron Petroleum Company Limited

Chevron Oil, Sociedad Anonima
Chevron Sulamesi Inc.
Chevron U.K. Limited
  BriTama Tankers Limited
  Chevron chemical U.K. Limited
  Chevron Oil (TOGH) Limited
  Chevron Pension Fund Trustee Company Limited
    Gulf Pension Fund Trustee Company Limited
      Gulf Pension Fund Trustee Company Limited
    Chevron Pension Fund Trustee Company Limited
    Gulf International Trading Company (Europe) Limited
      Chevron Chemical U.K. Limited
    Gulf Oil Financial Services Company Limited
    Gulf Oil North Sea Limited
    Gulf Oil Refining Limited
  Eastern Gulf Oil Company Limited
    Britama Tankers Limited
  Gulf International Trading Company (Europe) Limited
  Gulf Oil (Great Britain) Limited
  Gulf Oil Financial Services Company Limited
    Chevron Chemical U.K. Limited
  Gulf Oil North Sea Limited
  Gulf Oil Terminals (Ireland) Limited

Gulf Pension Fund Trustee Company Limited
Chevron Pension Fund Trustee Company Limited
Chevron Pension Fund Trustee Company Limited
Gulf International Trading Company (Europe) Limited
Gulf Oil Financial Services Company Limited
Gulf Oil North Sea Limited
Gulf Oil Refining Limited
Gulf Pension Fund Trustee Company Limited
Gulf International Trading Company (Europe) Limited
Gulf Oil Financial Services Company Limited
Chevron Chemical U.K. Limited
Gulf Oil North Sea Limited
Gulf Oil Refining Limited
Kewanee Oil Company (U.K.) Limited
Chevron U.K. Offshore Exploration Company Limited
Compania Minera Chevron Dominicana, S.A.
Douala Gulf Oil Company
Eastern Gulf Oil Company Limited
Britama Tankers Limited
Ecuadorian Gulf Oil Company
Global Energy Operations and Management Company, Ltd.
Gulf Agricultural Chemicals Company Limited
Chevron (U.K.) Offshore Investments Limited
Chevron Oil (TNS) Limited
Chevron Oil (TOGH) Limited
Chevron Oil (TNS) Limited

Chevron Oil (TOI) Limited
Chevron Oil (TOI) Limited
Chevron Oil (TNS) Limited
Chevron U.K. Offshore Exploration Company Limited
Chevron U.K. Limited
Britama Tankers Limited
Chevron Chemical U.K. Limited
Chevron Oil (TOGH) Limited
Chevron Pension Fund Trustee Company Limited
Eastern Gulf Oil Company Limited
Britama Tankers Limited
Gulf International Trading Company (Europe) Limited
Gulf Oil (Great Britain) Limited
London Oil Refining Co. Limited, The
Gulf Oil Refining Limited
Lorco Oils (North) Limited
London Oil Refining Co. Limited, The
Lorco Oils (North) Limited
Mainline Pipelines Limited
Gulf Oil Financial Services Company Limited
Gulf Oil North Sea Limited
Gulf Oil Terminals (Ireland) Limited
Britama Tankers Limited
Gulf Pension Fund Trustee Company Limited
Kewanee Oil Company (U.K.) Limited
Compania Minera Chevron Dominicana, S.A.
Gulf Oil (Great Britain) Limited
Gulf Oil Refining Limited
London Oil Refining Co. Limited, The
London Oil Refining Co. Limited, The

Lorco Oils (North) Limited
Lorco Oils (North) Limited
Mainline Pipelines Limited
Gulf Oil Zaire S.A.R.L.
Gulf Kuwait Company
Burgan Pension Fund Trustees Limited
Gulf Oil Zaire S.A.R.L.
Kuwait Oil Company Limited
Burgan Pension Fund Trustees Limited
Kuwait Oil Company Trustees Limited
Kuwait Oil Company Trustees Limited
Gulf Oil (Ireland) Limited
Gulf Oil Company (Nigeria) Limited
Gulf Oil Company of Gabon
Gulf Oil Company — Eastern Hemisphere
Gulf Oil Finance N.V.
Gulf Oil Services, Inc.
Gulf Oil Zaire S.A.R.L.
Gulf Research & Development Company
Chevron Chemical (Hong Kong) Limited
Compania Minera Chevron Dominicana, S.A.
Gulf Oil Company (Nigeria) Limited
Gulf Oil Zaire S.A.R.L.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Meni Grande Oil Company
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
Norske Gulf Production Company A/S
Norwegian Gulf Exploration Company A/S
South Pacific Chevron Company
Suriname Gulf Oil Company
UMC Incorporated
Western Company, The
Western Transnav Company
575 Market Street Building Corporation

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 16, 1988, I served the within Brief in opposition in re: "Jack Abadjian vs. Gulf Oil Corporation" in the United States Supreme Court, October Term 1988, No. 88-674.

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Donald C. Smaltz, Esq.
Leighton M. Anderson, Esq.
Morgan, Lewis & Bockius
801 South Grand Avenue, Suite 2200
Los Angeles, California 90017

Kenneth P. Roberts
5850 Canoga Avenue, Suite 400
Woodland Hills, California 91367

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on November 16, 1988, at Los Angeles, California

CE CE MEDINA